130-43

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 157.

HOLLON PARKER, APPELLANT,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED OCTOBER 19, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 20, 1888.

1 TERRITORY OF WASHINGTON, } ss:
First Judicial District, }

In the District Court of the First Judicial District, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

2 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

To redeem real property.

To the Hon. S. C. Wingard, judge of the above-entitled court:

1st. The plaintiff complains and alleges—

2nd. That on the 28th day of December, A. D. 1874, the above-named plaintiff, Hollon Parker, was and ever since has been the owner in fee of the following-described premises, situated, lying, and being in the county of Walla Walla, Washington Territory, and more particularly described as follows, to wit:

S. E. ¼ of section "17," township "7" north, range "36" east.

The E. half of N. E. ¼ and the S. W. ¼ of the N. E. ¼ of section 22, in twp. 7 N., R. 36.

The west half of N. W. ¼ of section 23, in twp. 7 N., R. 36 east.

The N. half of S. E. ¼ and lot 4, sec. 35, twp. 8 N., R. 35 east.

The W. half of S. E. ¼ of sect. 27, in twp. 7 N., R. 35 east.

3 The S. half of the S. W. ¼ of sec. 27, in twp. 7 N., R. 35 east.

Lot six, in block five, in the city of Walla Walla, in said county and Territory.

3d. That said premises at the time aforesaid were subject to a decree recovered by one Joseph Petrain against Edward Sheil, The City of Walla Walla, W. B. Thomas, John F. Abbott, and D. Buroker, in an action in the district court of the first judicial district of Washington Territory, holding terms at Walla Walla city for the counties of Walla Walla and Whitman, and that the sheriff of Walla Walla county, W. T., by his deputy, F. Kimmerly, under and by virtue of said decree and order, sold said property above described on the 2d day of Jan'y, 1875, at public auction.

4th. That at such sale the defendants became the purchasers of said property as follows, to wit:

Defendant Dacres purchased the S. E. ¼ of sec. "17," twp. "7" N., R. 35 east, less one acre.

Defendant, H. P. Isaacs, purchased the east half of N. E. ¼ and the S. W. ¼ of the N. E. ¼ of sec. 22, in twp. 7 N., R. 36 east.

Defendant, Alfred Thomas, purchased the west half of N. W. ¼ of section 23, in twp. 7 N., R. 36 east.

4 Defendant, J. C. Smith, purchased the N. half of the S. E. ¼ and lot 4, sec. 35, twp. 8 N., R. 35 east.

Defendant, James McAuliff, purchased the west half of S. E. ¼ of sec. 27, in twp. 7 N., R. 35 east.

Defendant, William Kirkman, purchased the S. half of the S. W. ¼ of sec. 27, in twp. 7 N., R. 35 east.

Defendant, John Lucas, purchased lot six, block five, in the city of Walla Walla, in said county and Territory, and the sheriff aforesaid, under and by virtue of said purchase at said sale as aforesaid, issued to said defendants and each of them a certificate of sale.

5th. That afterwards and before the expiration of six months from the confirmation of said sale the plaintiff tendered to George F. Thomas, in United States legal-tender money, the amount necessary to redeem said property described, on the 10th day of November, A. D. 1875, at his office, in Walla Walla city, W. T., between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, and said George F. Thomas was then and there the duly elected and qualified and acting sheriff in and for said county and Territory, and he as such sheriff then and there at the time last aforesaid refused to receive said tender or any part of the money thereof tendered, and

5 the plaintiff now brings the same into this court and deposits the same with the clerk of said court.

6th. That long prior to making the aforesaid tender defendants had notified plaintiff that they would not permit him to redeem said property, and they unlawfully and wrongfully, on the 2d day of Jan'y, 1875, entered into possession of said premises and have ever since so held the same.

7th. That by reason of the aforesaid refusals to allow plaintiff to redeem said property he has been damaged in rents, issues, and profits in the sum of five dollars per acre per year for each and every acre of said property since the 28th day of December, A. D. 1874, to the time of the filing of this complaint, and the aforesaid lot $600.00 per year.

8th. That said defendants now, each and every one of them, hold deeds executed, one by an ex-sheriff of said county named George F. Thomas and the other by an ex-sheriff of said county named B. W. Griffin; that the same are entered of record in the auditor's office of Walla Walla county, W. T., and are fradulent and void.

Wherefore plaintiff prays that any and all deeds to said property executed under and by virtue of said sale and under said decree be declared null and void, and the sheriff of Walla Walla county,

6 as such sheriff and as commissioner appointed by this honorable court, be directed to make, execute, and deliver to plaintiff a good and sufficient deed in and to said property; that the plaintiff have and recover of and from def'ts his rents, issues, and

profits, as damages for the use and occupation of said premises, the sum of $5.00 per acre per year for each and every acre of said premises from the 28th day of December, A. D. 1874, and legal interest thereon, and costs and disbursements of suit.

A. E. ISHAM,
Pl'ff's Att'y.

TERRITORY OF WASHINGTON, } ss:
Walla Walla County, }

I, Hollon Parker, being first duly sworn, depose and say: I am the plaintiff in the above-entitled complaint and know the contents thereof and believe the same to be true.

H. PARKER.

Subscribed and sworn to before me this the 15th day of May, A. D. 1884.

A. REEVES AYRES,
Clerk District Court.

Endorsed: Complaint. Filed May 15th, 1884. A. Reeves Ayres, clerk district court.

7 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

The United States of America to George Dacres, H. P. Isaacs, Alfred Thomas, J. C. Smith, Wm. Kirkman, John Lucas, and James McAuliff, defendants:

You are hereby required to appear in an action brought against you by Hollon Parker, plaintiff, in the district court of the Territory of Washington and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory, to answer the complaint of plaintiff, filed in Walla Walla county, within twenty days after the service of this summons, exclusive of the day of service, if served in said counties; if not served in said counties, but in said district, in thirty days; if served in any other judicial district in the Territory, in forty
8 days; if served by publication, within sixty days after first publication of this summons, or the said plaintiff will take judgment against you by default, according to the prayer of the complaint.

Witness the Hon. S. C. Wingard, associate justice of the supreme

court of Washington Territory and judge of said court, and the seal thereof affixed this ninth day of April, A. D. 1885.

[Seal of Dist. Court.]

A. REEVES AYRES, *Clerk*,
By F. W. GOODHUE, *Deputy*.

A. E. ISHAM,
Plaintiff's Attorney.

9 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within summons and annexed complaint on each of the within-named defendants, Wm. Kirkman, Alfred Thomas, J. C. Smith, John Lucas, George Dacres, James McAuliff, and H. P. Isaacs, in Walla Walla county, Washington Territory, on the eleventh day of April, A. D. 1885, by then and there delivering to each of said defendants personally a copy of said summons, and that I at the same time and place delivered to each of said defendants personally with said copy of summons a copy of the complaint in said action.

ARCHER S. BOWLES,
Sheriff of Walla Walla County, W. T.

[Endorsed:] Case No. 3960. Summons. In the district court of the Territory of Washington and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory. Holon Parker, plaintiff, *vs.* George Dacres, *et al.*, defendants. Returned and filed this 17th day of April, A. D. 1885. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy. Sheriff's fees, $8.40.

10 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

Now comes the defendants, George Dacres, H. P. Isaacs, John Lucas, James McAuliff, and William Kirkman, appearing for themselves only, and demur to the complaint of the plaintiff herein filed upon the following grounds, to wit:

First. Because several causes of action have been improperly united.

Second. Because the said complaint does not state facts sufficient to constitute a cause of action.

ALLEN, THOMPSON AND CROWLEY, AND
B. L. AND J. L. SHARPSTEIN,
Attorneys for the Defendants, George Dacres, H. P. Isaacs, Wm. Kirkman, John Lucas, and James McAuliff.

11 Service of the within accepted and copy waived this 22d day of April, 1885.

A. E. ISHAM,
Attorney for Plaintiff.

Endorsed: Demurrer. Filed April 22, 1885. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy.

12 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

Now comes the defendant, Alfred Thomas, and demurs to the complaint of the plaintiff herein upon the following grounds, to wit:

1st. Because several causes of action have been improperly united in said complaint.

2d. Because said complaint does not state facts sufficient to constitute a cause of action.

ALLEN, THOMPSON AND CROWLEY, AND
B. L. AND J. L. SHARPSTEIN,
Attorneys for the Defendant, Alfred Thompson.

Service of the within demurrer accepted. Copy waived May 2, 1885.

A. E. ISHAM,
Attorney for Plaintiff.

Endorsed: Demurrer of def't, Alfred Thompson. Filed May 2, 1885. A. Reeves Ayres, clerk.

In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla, for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Def'ts.

To redeem real property.

To the Honorable S. C. Wingard, judge of the above-entitled court:

1st. The plaintiff complains and alleges in this his amended complaint—

2nd. That on the 28th day of December, A. D. 1874, the above-named plaintiff, Hollon Parker, was and ever since has been the owner in fee of the following-described premises, situate, lying, and being in the county of Walla Walla, Washington Territory, and more particularly described as follows, to wit:

S. E. ¼ of sec. "17," township "7" north, rang- "36" east.

The E. ½ of N. E. ¼ and the S. W. ¼ of the N. E. ¼ of sec. 22, in township 7 N., R. 36 E.

The west half of N. W. ¼ of sec. 23, in twp. 7 N., R. 36 east.

The N. half of S. E. ¼ and lot 4, sec. 35, twp. 8 N., R. 35 east.

The W. half of S. E. ¼ of sec. 27, in twp. 7 N., R. 35 east.

14 The S. half of the S. W. ¼ of sec. 27, in twp. 7 N., R. 35 east.

Lot 6, in block 5, in the city of Walla Walla, in said county and Territory.

3rd. That said premises at the time aforesaid were subject to a decree recovered by one Joseph Petrain against Edward Shiel, The City of Walla, W. B. Thomas, John F. Abbott, and D. Buroker, in an action in the district court of the 1st judicial district of Washington Territory, holding terms at Walla Walla city for the counties of Walla Walla and Whitman, and that the sheriff of Walla Walla county, W. T., by his deputy, F. Kimmerly, under and by virtue of said decree and order, sold said property above described on the 2d day of Jan'y, 1875, at public auction.

4th. That at such sale the def'ts became the purchasers of said property as follows, to wit:

Defendant Dacres purchased the S. E. ¼ of sec. "17," twp. "7" N., R. 35 east, less one acre.

Defendant, H. P. Isaacs, purchased the E. ½ of N. E. ¼ and the S. W. ¼ of the N. E. ¼ of sec. "22," in twp. 7 N., R. 36 east.

Defendant, Alfred Thomas, purchased the west half of the N. W. ¼ of sec. 23, in twp. 7 N., R. 36 E.

Defendant, J. C. Smith, purchased the N. half of S. E. ¼ and lot 4, sec. 35, twp. 8 N., R. 35 east.

Def't, James McAuliff, purchased the west half of S. E. ¼ of sec. 27, in twp. 7 N., R. 35 east.

15 Deft, Wm. Kirkman, purchased the S. half of the S. W. ¼ of sec. 27, in twp. 7 N., R. 35 east.

Deft, John Lucas, purchased lot 6, block 5, in the city of Walla Walla, in said county and Territory, and the sheriff aforesaid, under and by virtue of said purchase at said sale as aforesaid, issued to said def'ts and each of them a certificate of sale.

5th. That afterwards, and before the expiration of six months from the confirmation of said sale, the pl'ff tendered to George F. Thomas, in United States legal-tender money, the amount necessary to redeem said property described, on the 10th day of November, A. D. 1875, at his office, in Walla Walla city, Walla Walla county, W. T., between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, and at said time and place the said pl'ff presented and exhibited to said sheriff papers showing that he had given to def'ts notice that he would apply to redeem said property as aforesaid and as by law required, and at the same time and place presented to said sheriff a certified copy of the decree in the case wherein Joseph Petrain was pl'ff and Edward Sheil, The City of Walla Walla, W. B. Thomas, John F. Abbott, and D. Buroker were def'ts, and papers showing the
16 amount still due on the decree in the last aforesaid cause of action and a certified copy of the deed from Edward Sheil to pl'ff, duly certified by the auditor of Walla Walla county, W. T., wherein and whereby the said Edward Sheil transferred, sold, and delivered, on the 28th day of Dec., 1874, to pl'ff all of the property hereinbefore described and sought to be redeemed as aforesaid by plaintiff; and said George F. Thomas was then and there the duly elected and qualified and acting sheriff in and for said county and Territory, and he, as such sheriff, then and there, at the time last aforesaid, refused to receive said tender or any part of the money thereof tendered, and the pl'ff now brings the same into this court and deposits the same with the clerk of this court.

That the said Hollon Parker sought to redeem said property, and pl'ff above named gave to the purchasers and def'ts above named at least two days' notice prior to the 10th day of November, A. D. 1875—a written notice that he would on said 10th day of November, A. D. 1875, apply to the said sheriff of Walla Walla county, W. T., at his office in said county and city of Walla Walla, W. T., to redeem said property, and that he was and had been from the 28th day of
17 Dec., 1874, the legal owner in fee simple and entitled to the possession of said property, and that he gave to said purchasers the said two days' written notice, as required by statute, that he would, on said 10th day of November, A. D. 1875, apply to said sheriff to redeem said property, and would then and there tender to said sheriff the money, as by law required, for the purpose of the redemption of said property.

6th. That long prior and more than two days before the making of the aforesaid tender def'ts notified pl'ff that they would not permit him to redeem said property, and they unlawfully and wrongfully, on the 2d day of January, 1875, entered into and took possession of said premises and have ever since held the same.

7th. That by reason of the aforesaid refusal to allow pl'ff to re-

deem said property, and defendants having possession of the same as aforesaid, he has been damaged in rents, issues, and profits in the sum of, to wit, H. P. Isaacs and J. C. Smith and Alfred Thomas have damaged pl'ff in the sum of two dollars per acre per year *per month* for each and every acre of land so held and purchased by them for the last six years prior to the commencement of this action.

18 And the said plaintiff has been damaged by the def'ts, George Dacres, Wm. Kirkman, and James McAuliff, for each and every acre per year *per month* so held and purchased by them for the last six years prior to the commencement of this action, in the sum of five dollars per acre for *for* each and every acre of land so held by them for the last six years prior to the commencement of this action, and the plaintiff has been damaged by the def't, John Lucas, in the sum of fifty dollars per month for each and every year for the last six years prior to the commencement of this action for the real property so held and possessed by him as aforesaid.

8th. That said defendants now, each and every one of them, hold deeds executed, one by an ex-sheriff of said county named Geo. F. Thomas and another deed executed by an ex-sheriff of said county named B. W. Griffin ; that the same are entered of record in the auditor's office as public records of Walla Walla county, Washington Territory, and are fraudulent and void.

1st. Wherefore plaintiff prays that any and all deeds executed as aforesaid for said property under and by said sale and under and by virtue of said decree be declared null and void, and that the

19 sheriff of Walla Walla county, and as such sheriff and as a commissioner appointed by this honorable court, be directed to make, execute, and deliver to pl'ff a good and sufficient deed to and for said property.

2nd. That the pl'ff have and recover of and from def'ts his rents, issues, and profits as damages for the use of said premises the sum of two dollars per acre for each and every acre so held by H. P. Isaacs, J. C. Smith, and Alfred Thomas for the last six years immediately prior to this action, and that he have and recover of and from the def'ts, George Dacres, Wm. Kirkman, and James McAuliff, the sum of five dollars per acre per year for each and every acre of land so held by them as aforesaid for the six years immediately prior to the commencement of this action.

And that the plaintiff have and recover of and from the def't, John Lucas, the sum of fifty dollars per month for each and every year the said Lucas has held said property as aforesaid for the last six years immediately prior to the commencement of this action, and for his costs and disbursements, and for such other and further relief as may seem meet and equitable to the court, and interest on said damages.

20 A. E. ISHAM,
Pl'ff's Attorney.

TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Hollon Parker, being duly sworn, depose and say that I am the pl'ff in the above-entitled amended complaint and that I know the contents thereof and believe the same to be true.

HOLLON PARKER.

Subscribed and sworn to before me this 21st day of May, A. D. 1885.

A. REEVES AYRES,
Clerk District Court.

Service of the within is accepted and copy waived.
May 21st, 1885.

B. L. AND J. L. SHARPSTEIN,
Of Att'ys for Def'ts Named in Demurrer Heretofore Filed Herein.

Endorsed: Amended complaint. Filed May 21st, 1885. A. Reeves Ayres, clerk district court.

21 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

Come now the defendants, George Dacres, H. P. Isaacs, Alfred Thomas, Wm. Kirkman, John Lucas, and James McAuliff, and, appearing for themselves only, demur to the amended complaint herein filed for the reasons following:

1st. That the amended complaint does not state facts sufficient to constitute a cause of action.

2d. That several causes of action have been improperly united in said amended complaint.

Wherefore defendants ask that said action be dismissed.

B. L. AND J. L. SHARPSTEIN,
ALLEN, THOMPSON, AND CROWLEY,
Attorneys for Defendants, George Dacres, H. P. Isaacs, Alfred Thomas, Wm. Kirkman, John Lucas, and James McAuliff.

22 Due service of the within demurrer admitted and copy waived.
May 22d, 1885.

A. E. ISHAM,
Attorney for Plaintiff.

Endorsed: Demurrer to amended complaint. Filed May 22d, 1885. A. Reeves Ayres, clerk.

23 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

Be it remembered that at the regular May term, A. D. 1885, of the district court of Washington Territory, and for the first judicial district thereof, holding terms at Walla Walla, Walla Walla county, in said Territory, begun and held at the city of Walla Walla, on Monday, the fourth day of May, A. D. 1885, Hon. S. C. Wingard, sole judge, presiding, among other the following proceeding were had, to wit:

Thirteenth Judicial Day.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES *et al.*, Defendants. } 3690.

MONDAY, *May* 18*th*, 1885.

Now, on this day, this cause came on for hearing on demurrer of defendants to the complaint of plaintiff, and the same was argued by respective counsel and sustained by the court, and plaintiff has leave to amend his complaint.

(Signed) S. C. WINGARD, *Judge, &c.*

24 Eighteenth Judicial Day.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES *et al.*, Defendants. } 3960.

SATURDAY, *May* 23*rd*, 1885.

Now, on this day this cause came on for hearing on demurrer of defendants to the amended complaint of plaintiff filed herein, and the same was argued by respective counsel till the hour of adjournment.

(Signed) S. C. WINGARD, *Judge, &c.*

25 Twentieth Judicial Day.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES *et al.*, Defendants. } 3960.

TUESDAY, *May* 26*th*, 1885.

Now, on this day this cause coming on to be heard on demurrer to amended complaint brought on for argument on Saturday, May 23rd, and the cause proceeded, as on said day, by hearing of the argument of counsel till the close of the same, when the same was then taken under advisement by the court.

(Signed) S. C. WINGARD, *Judge, &c.*

26 Twenty-First Judicial Day.

H. PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, Wm. Kirkman, John Lucas, and James McAuliff, Defendants. } 3960.

WEDNESDAY, *May 27th*, 1885.

Now, on this day the demurrer of defendants to plaintiff's amended complaint heretofore taken under advisement by the court, is here now sustained by the court, the court being advised in the premises; to which ruling of the court counsel for plaintiff duly excepted and exceptions allowed by the court.

(Signed) S. C. WINGARD, *Judge, &c.*

27 *Judgment.*

Twenty-Second Judicial Day.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, Wm. Kirkman, John Lucas and James McAuliff, Defendants. } 3960.

THURSDAY, *May 28th*, 1885.

This cause came on for a hearing on the demurrer filed herein to plaintiff's amended complaint, and, after argument of counsel, the court sustained the demurrer, and the plaintiff then stated that he did not wish to further amend.

Therefore, on motion of defendants' attorneys, it is considered and adjudged that this action be dismissed at the costs of plaintiff.

And it is further considered and adjudged that the defendants have and recover of and from the plaintiff the costs of this action, taxed at $53.95, and that execution issue therefor.

(Signed) S. C. WINGARD, *Judge, &c.*

28 *Notice of Appeal.*

Twenty-Third Judicial Day.

HOLLON PARKER, Plaintiff,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Defendants.

FRIDAY, *May 29th*, 1885.

Now comes the plaintiff and in open court gives notice to the defendants and their attorneys and to all others that he appeals this cause to the supreme court of Washington Territory, and requests

that the said notice be entered of record, which is accordingly here now done.

(Signed) S. C. WINGARD, *Judge, &c.*

29 In the District Court of the Territory of Washington and for the First Judicial District Thereof, Holding Terms at Walla Walla for the Counties of Walla Walla and Franklin, in said Territory.

HOLLON PARKER, Plaintiff, *vs.* GEORGE DACRES *et al.*, Def't-:

Be it remembered that this cause came on for hearing on this 26th day of May, 1885, upon the demurrer heretofore filed in this cause. The parties appeared, by their respective attorneys of record, and after argument the court took said cause under advisement. And now, on this 27th day of May, A. D. 1885, the court being advised in the premises, sustained said demurrer and the whole thereof; to all of which ruling the plaintiff excepted and exception was allowed. Thereupon plaintiff gave notice that he would not take leave to amend, but would appeal said cause. Whereupon defendants moved the court for judgment for their costs, and judgment was granted in said cause in favor of defendants and against plaintiff; to all of which the plaintiff excepted and the exception was allowed May 29th, 1885.

(Signed) S. C. WINGARD, *Judge, &c.*

(Endorsement on back.)

Endorsed: Bill of except-ons. Filed May 29th, 1885. A. Reeves Ayres, clerk, by F. W. Goodhue, deputy.

30 *Certificate.*

TERRITORY OF WASHINGTON, } ss:
First Judicial District, }

I, A. Reeves Ayres, clerk of the district court of Washington Territory and for the first judicial district thereof, holding terms at Walla Walla for the counties of Walla Walla and Franklin, in said Territory, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on appeal to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said district court this 15th day of June, 1885.

[Seal of District Court.]

A. REEVES AYRES, *Clerk,*
By F. W. GOODHUE, *Deputy.*

31 *Judgment.*

HOLLON PARKER
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WILLIAM KIRKMAN, JOHN LUCAS, and JAMES MCAULIFF, Appellees. } #419.

AUGUST 4TH, 1885.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the first judicial district of Washington Territory, holding terms at Walla Walla, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 4th day of August, A. D. 1885, on motion of B. F. Sharpstein, Esquire, of counsel for appellees, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed, with costs, and that the said George Dacres, H. P. Isaacs, Alfred Thomas, J. C. Smith, William Kirkman, John Lucas, and James McAuliff recover of and from the said Hollon Parker the costs of this action, taxed and allowed at $38.60 *dollars*, and that execution issue therefor; and it is further ordered that this cause be remitted to the said district court.

32 TERRITORY OF WASHINGTON, } *ss:*
Thurston County, }

In the Supreme Court of Washington Territory. July Term, A. D. 1885.

HOLLON PARKER, Appellant,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WILLIAM KIRKMAN, JOHN LUCAS, JAMES MCAULIFF, Appellees.

I, A. E. Isham, being *being* first duly sworn, depose and say: I am the attorney for the appellant in the above-entitled cause, and was such attorney of record on the trial of this cause in this court and in the court below; that the appellant is not in this county; that I am fully acquainted with all of the facts and the value of the property and the amount involved in this action;
33 that the value of the property and the amount involved which appellant claims against the appellees and for which he prosecutes this suit exceeds the sum of five thousand dollars ($5,000.00) over and above all legal counter-claims, set-offs, interest, and costs, and the amount in controversy in said action between appellant and appellee does now and did at the time of the commencement of the action exceed the sum of $5,000.00 over and above any claims of appellees against appellant exclusive of interest and costs.

A. E. ISHAM, *Clerk.*

Subscribed and sworn to before me this August 4th, 1885.
R. G. O'BRIEN, *Clerk.*

(Endorsement:) "Filed Aug. 4, 1885. R. G. O'Brien, clerk."

34 In the Supreme Court. July Term, 1885.

HOLLON PARKER, Appellant,
vs.
GEORGE DACRES *et al.*, Appellees.

TUESDAY, *Aug.* 4, 1885.

Comes now the appellant, by A. E. Isham, Esquire, his attorney, and moves the court for leave to withdraw the transcript herein for the period of 30 days, and the court, being fully advised in the premises, grants said motion upon said attorney giving receipt to the clerk therefor; and now, on motion of said attorney, it is further ordered that a supersedeas bond herein be given in the sum of five hundred ($500) dollars for the stay of proceedings.

35 In the Supreme Court of Washington Territory. July Term, A. D. 1885.

HOLLON PARKER, Plaintiff and Appellant,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. Kirkman, John Lucas, and James McAuliff, Defendants and Appellees.

The above-named complainant and appellant, conceiving himself aggrieved by the final decree entered on the 4th day of August, 1885, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the records, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court of the United States.

A. E. ISHAM,
JOHN H. MITCHELL,
Attorneys for Hollon Parker, Appellant.

This appeal is allowed.
31st August, 1885.

ROGER S. GREENE,
Chief Justice of the Supreme Court of Washington Territory.

36 *Assignment of Errors as Required by Section 997 Revised Statutes and the Rules of Supreme Court of the United States.*

In the Supreme Court of Washington Territory.

HOLLON PARKER, Appellant,

—

GEORGE DACRES *et al.*, Appellees.

1st. The court erred in sustaining the demurrer of the appellees, defendants in the court below, to the amended complaint.

2d. The court erred in affirming the judgment of the court below in sustaining the defendants' demurrer to plaintiff's amended complaint, dismissing plaintiff's bill and rendering judgment against appellant for costs.

3d. The court erred in failing to overrule the demurrer to plaintiff's amended complaint.

August 27th, 1885.

A. E. ISHAM,
JOHN H. MITCHELL,
Attorneys for Appellant.

[Endorsed:] Hollon Parker *vs.* Geo. Dacres *et al.* Notice of appeal & assignment of errors. Received and filed Sept. 1, 1885. R. G. O'Brien, clerk.

37 In the Supreme Court of Washington Territory. July Term, A. D. 1885.

HOLLON PARKER, Plaintiff and Appellant,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. Kirkman, John Lucas, and James McAuliff, Defendants and Appellees.

Know all men by these presents that we, Hollon Parker, as principal, and William H. Reed and Daniel Stewart, sureties, are held and firmly bound unto George Dacres, H. P. Isaacs, Alfred Thomas, J. C. Smith, Wm. Kirkman, John Lucas, and James McAuliff in the full and penal sum of five hundred dollars ($500.00), to be paid to the said George Dacres, H. P. Isaacs, Alfred Thomas, J. C. Smith, Wm. Kirkman, John Lucas, and James McAuliff, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 24th day of August, A. D. 1885.

38 Whereas the above-named Hollon Parker hath prosecuted an appeal in the supreme court of the Territory of Washington to the Supreme Court of the United States to reverse the

judgment rendered in the above-entitled action by the supreme court of the Territory of Washington on August 4th, 1885:

Now, therefore, the condition of this obligation is such that if the above-named Hollon Parker shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HOLLON PARKER. [SEAL.]
WILLIAM H. REED. [SEAL.]
DANIEL STEWART. [SEAL.]

Sealed and delivered in the presence of—
A. E. ISHAM.
JOHN A. TAYLOR.

I have examined this bond and know the sureties thereto and believe them to be sufficient and therefore approve said bond.
Dated August 24th, 1885.

S. C. WINGARD,
Associate Justice of the Supreme Court of Washington Territory.

I approve this bond.
31st August, 1885.

ROGER S. GREENE,
Chief Justice, &c.

UNITED STATES OF AMERICA, } ss:
Territory of Washington, Walla Walla County, }

We, William H. Reed and Daniel Stewart, sureties above named, being duly sworn, depose and say and each for himself saith that he is worth the sum of five hundred dollars, $500.00, over and above his just debts and liabilities.

39

WILLIAM H. REED.
DANIEL STEWART.

Subscribed and sworn to before me this 24th day of August, 1885.

[Notarial Seal of John A. Taylor.]

JOHN A. TAYLOR,
Notary Public.

[Endorsed:] Hollon Parker *vs.* Geo. Dacres *et al.* Bond. Received and filed Sept. 1, 1885. R. G. O'Brien, clerk.

40 UNITED STATES OF AMERICA, } ss:
Territory of Washington, }

In the Supreme Court of the United States of America.

HOLLEN PARKER, Plaintiff and Appellant,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, William Kirkman, John Lucas, and James McAuliff, Defendants and Appellees.

To George Dacres, H. P. Isaacs, Alfred Thomas, J. C. Smith, William Kirkman, John Lucas, and James McAuliff, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a notice of appeal and an allowance of appeal filed in the clerk's office of the supreme court of Washington Territory, wherein Hollen
41 Parker is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal and notice of appeal mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this first day of September, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of Supreme Court.]

R. G. O'BRIEN,
Clerk Supreme Court, Wash. Ter.

(Endorsed:) "Citation." Returned and filed September 22d, 1885. R. G. O'Brien, clerk.

42 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on the within-named appellee, John Lucus, in Walla Walla county, Washington Territory, on the 10th day of September, A. D. 1885, by then and there delivering, personally, to and leaving with Louise Lucus, his daughter and a member of his family, she being a suitable person over the age of 21 years, at the usual place of abode and dwelling-house of said appellee, a copy of said citation, the said appellee, John Lucus, after due and diligent search and inquiry made, not being found in said county.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.

43 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on each of the within-named appellees, George Dacres, H. P. Isaacs, and William Kirkman, in Walla Walla county, Washington Territory, on the 10th day of September, A. D. 1885, by then and there delivering to each of said appellee-, personally, a copy of said citation.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.

44 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on each of the within-named appellees, James McAuliff and Alfred Thomas, in Walla Walla county, Washington Territory, on the 11th day of September, A. D. 1885, by then and there delivering to each of said appellees, personally, a copy of said citation.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.

45 TERRITORY OF WASHINGTON, } ss:
County of Walla Walla, }

I, Archer S. Bowles, sheriff of Walla Walla county, Washington Territory, do hereby certify that I served the within citation on the within-named appellee, J. C. Smith, in Walla Walla county, Washington Territory, on the 12th day of September, A. D. 1885, by then and there delivering to said appellee, personally, a copy of said citation.

ARCHER S. BOWLES,
Sheriff Walla Walla County, W. T.

46 *Opinion.*

In the Supreme Court of Washington Territory. July Term, 1885.

HOLLEN PARKER
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. Smith, WILLIAM KIRKMAN, JNO. LUCAS, and JAMES McAULIFF. } #419.

This is a suit in equity, brought by the appellant as plaintiff in the lower court, to redeem property sold under a decree of the district court foreclosing a mortgage.

The complaint alleges, in substance, that on the 28th day of Dec., 1874, and ever since, the appellant was the owner in fee of the prop-

erty described in the complaint; that on the 2d day of January, 1875, said property was sold by the sheriff, at public auction, under and by virtue of the decree of foreclosure, and that the same, in separate lots, was bought at said sale by the respective defendants, the complaint describing the particular part or parcel purchased by each defendant; that afterwards, and before the expiration of
47 six months from the confirmation of said sale, the plaintiff, after giving the defendants due and legal notice that he would apply to redeem said property, tendered to the sheriff of Walla Walla county, in his office, during office hours, the amount of money necessary to redeem the same; that the said sheriff refused to receive the money so tendered or to recognize the right of appellant to redeem said land, and that the appellant now brings into court and deposits with the clerk the amount of money so tendered to the sheriff; that the defendants wrongfully and unlawfully, on the 2d day of January, 1875, severally entered upon the premises purchased by them at the mortgage sale and have ever since and now hold the same; that by reason of the wrongful refusal to permit appellant to redeem and the unlawful deprivation of his possession by the defendants he has been damaged in rents, issues, profits, &c.; that the defendants each hold deeds to the property purchased by them at the mortgage sale made to them by the sheriff of Walla Walla county, which deeds are of record and are fraudulent and void.

The complaint prays that the deeds executed to defend-
48 ants by the sheriff be declared null and void; that the sheriff, as a commissioner of the district court, be required to make and deliver to plaintiff a good and sufficient deed to said property, and that plaintiff be let into possession of the same; that plaintiff have and recover damages for the unlawful detention of the possession of the property and for general relief.

The defendants demurred to the complaint because—

1st. It does not state facts sufficient to constitute a cause of action.

2. Several causes of action have been improperly united in the complaint.

The lower court sustained the demurrer, and the plaintiff, declining to amend his complaint, brings the cause to this court on appeal.

The appellant bases his right to redeem the property upon the provisions of the civil practice act of 1873, chapter 33, which governed his rights at the time of the mortgage sale and of the offer to redeem.

This chapter is substantially the same as chapter 34 of the code of 1881, except that section 379 of the code is not found in the law of 1873.

49 The exclusion of the right to redeem from mortgage sales is made plain and unmistakeable in the code of 1881 by the addition of the last-named section. We think the same conclusion must be reached upon a consideration of the law of 1873, notwithstanding the absence of a provision analogous to that contained in section 379, chapter 33, of the act of 1873, deals entirely with executions at law, and the right to redeem granted by sections 364, 365, and 366 of that act does not in terms or by fair implication extend

to property sold in any other manner. The act explicitly defines what an execution shall be. Sections 321, 322 and 323.

This execution is entirely different from the order of sale issued by the clerk upon a decree of foreclosure. Section 565.

The conclusion that property sold under the decree of the district court to satisfy a mortgage is not subject to redemption under the act of 1873 is enforced by a consideration of the nature of mortgages under our system and of the effect of our foreclosure proceeding.

50 A mortgage of real property in this Territory does no more than create a lien. In the apt language of a learned author, "The debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest of the mortgagee from being a legal estate is changed into an equitable right enforceable by an equitable proceeding. It is for all purposes and under all circumstances personal assets. It may be assigned and passed to the mortgagee's personal representatives on his death. The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unencumbered by a payment of the debt secured by it at any time before the premises are actually sold under a decree of foreclosure." Pomeroy's Equity, section 1788.

The proceeding to foreclose such a mortgage is entirely different from that to foreclose the equity of redemption, which, to meet the hardships of the common law conception of a mortgage, was the creation of the courts of equity. Under our theory of a mortgage there is no such thing as an equity of redemption in the

51 mortgagor. The legal title has never passed from him. The equity is in the mortgagee, and consists in his right to hold the mortgaged property and to secure the payment of the mortgage debt. This being so, a provision which permitted property sold under a decree of foreclosure to be redeemed from the purchaser by the mortgagor within six months would diminish the security which the mortgagee has by the terms of the mortgage for the payment of his debt. Property sold free from the right to redeem would ordinarily bring a better price than property sold subject to the right to redeem. It is not to be supposed that it was the intention of the law to alter the contract which the parties have made for themselves and to impose an onerous condition upon one of them not provided in the contract unless the language of the law is plain and conclusive. When the security is ample no doubt a court of equity by virtue of its inherent equitable power may impose as a condition of sale

52 the right of the mortgagor to redeem upon proper conditions within a certain time.

But in the absence of any such condition in the decree of foreclosure the sale is absolute. The decree need not bar the equity of redemption, because there is no such thing. Whether or not it shall affirmatively provide for a redemption is a matter for the conscience of the chancellor upon a view of the facts in the case.

This view of the law is conclusive in this course. The demurrer to the complaint was rightfully sustained. The demurrer was prop-

erly sustained upon grounds. The cause of action, if any, in the plaintiff accrued in the year 1875. The complaint in this case was not filed until May 15th, 1884. The limitation for such an action is that provided by section 33 of the code, and is two years. (Hubbell *vs.* Sibly, 50 New York Court of Appeals, 468; Miner *vs.* Beekman *et al.*, 50 New York Court of Appeals, 337.)

The judgment of the court below is affirmed.

GEO. TURNER,
Associate Justice.

We concur.

ROGER S. GREENE,
Chief Justice.
JOHN P. HOYT,
Associate Justice.

[Endorsed:] Filed Aug. 4th, 1885. R. G. O'Brien, clerk.

53 *Certificate of Clerk Supreme Court, W. T'y.*

In the Supreme Court of Washington Territory. July Term, 1885.

HOLLON PARKER *vs.* GEORGE DACRES *et al.*

I, R. G. O'Brien, clerk of the supreme court of Washington Territory, do certify the foregoing, from pages 1 to 30, to be a true copy of the transcript of the record of the district court of the first judicial district of Wash. Ter., holding terms at Walla Walla, upon which said cause was determined in this supreme court, and that the foregoing, from page 31 to page 42, is a true transcript of all the papers filed and journal entries made of record in this supreme court in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 26 September, A. D. 1885.

[Seal Supreme Court, Washington Territory.]

R. G. O'BRIEN,
Clerk Supreme Court, W. T'y.

54 *Mem. of Costs Supreme Court, W. T'y.*

Clerk's fees	18 40
Transcript	13 00
Printing briefs	7 50
Attorney fee	15 00
	$53 90

Endorsed on cover: Washington Terr'y supreme court. No. 157. Hollon Parker, appellant, *vs.* George Dacres, H. P. Isaacs, Alfred Thomas, *et al.* Filed October 19, 1885.

Supreme Court of the United States.

DECEMBER TERM, 1888.

HOLLON PARKER, *Appellant*,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, AND JAMES McAULIFF, *Appellees*.

No. 157.

Appeal from the Supreme Court of Washington Territory.

The following Extracts from the Codes of Washington Territory, California, and of Iowa, respectively, are submitted by leave and direction of the Court, given at the close of the Argument of the Cause.

W. W. UPTON,
Attorney for Appellees.

Extracts from Civil Practice Act of Washington Territory, 1873 (see page 84):

Sec. 321. There shall be four kinds of execution: One against the property of the judgment debtor, another against the person, a third for the delivery of the possession of real or personal property or such delivery with damage for withholding the same, and the fourth commanding the enforcement of or obedience to any special order of the court. And in all cases there shall be an order to collect the costs.

Sec. 322. The writ of execution shall be issued in the name of the United States, sealed with the seal of the court and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner, when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the district or county where judgment was rendered, the names of parties, the amount of judgment, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of the personal property of the debtor, and if sufficient personal property cannot be found, out of his real property, upon which the judgment is a lien.

2. If it be against real or personal property in the hands of representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein. If a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of his real property. When it is to enforce obedience to any special order, it shall particularly command what is to be done or to be omitted. When the nature of the case shall require it, the execution may embrace one or more of the requirements above mentioned. And in all cases the execution shall require the collection of all interest, costs, and increased cost thereon.

See page 100:

Sec. 364. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases such property shall be subject to redemption as hereinafter provided in this chapter. At the time of the sale the sheriff shall give to the purchaser a certificate of the sale, containing—

1. A particular description of the property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it shall be so stated.

The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ.

Sec. 365. Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest:

1. The judgment debtor or his successor in interest in the whole or in part of the property separately sold.
2. A creditor having a lien by judgment, decree, or mortgage on any portion of the property or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold.

The persons mentioned in subdivision two of this section are termed redemptioners.

Sec. 366. The judgment debtor or redemptioner may redeem the property within six months from the date of the order confirming the sale by paying the amount of the purchase-money, with interest at the rate of two per cent. per month thereon from the time of sale, together with any taxes which the pur-

chaser may have paid thereon, and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien, with interest.

Sec. 367. If the property be so redeemed by a redemptioner, either the judgment debtor or any other redemptioner may, within sixty days from the last redemption, again redeem it by paying the sum paid on the last redemption, with interest at the rate of two per centum per month thereon from the date of the last preceding redemption in addition, together with the amount of any taxes which the last redemptioner may have paid thereon, and unless his lien be prior to that of such redemptioner, the amount of such lien, with interest. The property may be again, and as often as a debtor or redemptioner is disposed, redeemed from the last previous redemptioner, within sixty days from the date of the last redemption, on paying the sum paid on the last previous redemption, with interest at the rate of two per centum per month thereon from the date of such previous redemption, together with the amount of any taxes paid thereon by such last redemptioner and the amount of any liens held by such last redemptioner prior to his own, with interest. Notice of redemption shall be given to the sheriff.

Sec. 368. If no redemption be made within six months from the confirmation of the sale, the purchaser shall be entitled to a conveyance from the sheriff. * * *

Sec. 369. The mode of redeeming shall be as provided in this section:

1. The person seeking to redeem shall give the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose; at the time specified in such notice such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate as in case of a sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:

2. Proof that the notice required by this section has been given to the purchaser or redemptioner, or waived.

3. If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified to the clerk of the court where such judgment or decree is docketed, or, if he seeks to redeem upon mortgage, the certificate of the record thereof.

4. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent showing the amount then actually due on the judgment, decree, or mortgage.

5. If the redemptioner or purchaser have a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded.

Sec. 370. When two or more persons apply to the sheriff to redeem, at the same time, he shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if he attend at the redemption, or, if not, at any time thereafter, when demanded. Where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required by order of the court or judge thereof to allow such redemption.

Sec. 371. Until the expiration of the time allowed for redemption, the court or judge thereof may restrain the commission of waste on the property by order granted with or without notice. * * *

Sec. 372. The purchaser from the day of sale until a resale or a redemption, and the redemptioner from the day of redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period.

Sec. 373. The party to whom such sheriff's deed is given shall, upon the receipt thereof, take the same to the clerk of the district court, who shall enter in his book of levies where the levy is recorded, the sale of real estate therein conveyed, and shall endorse the fact upon the deed with the date when presented to him and when made, and no county auditor shall record any such deed without such endorsement.

See page 149:

CHAPTER L.

FORECLOSURE OF MORTGAGE.

Sec. 561. When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the district court of the district or county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage.

Sec. 562. When there is no express agreement in the mortgage nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged.

Sec. 563. In rendering judgment of foreclosure the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt with interest and costs at any time before sale shall satisfy the judgment.

Sec. 564. When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied upon any property of the mortgaged debtor.

Sec. 565. A copy of the order of sale and judgment shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises or so much thereof as may be necessary to satisfy the judgment, interest, debt and costs as upon execution; and if any part of the judgment, interest, and costs remain unsatisfied the sheriff shall forthwith proceed to levy the residue on the property of the defendant. The sheriff shall endorse upon the order of sale the time when he received it, and all subsequent proceedings under the said order shall conform, except as hereinafter provided, to the provisions regulating the sales of property upon execution.

Sec. 566. The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.

Sec. 567. Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment the court shall direct at what time and upon what default any subsequent execution shall issue.

Sec. 568. In such cases, after final judgment, the court shall ascertain whether the property can be sold in parcels, and if it

can be done without injury to the interests of the parties, the court shall direct only so much of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs, and the judgment shall remain and be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected.

Sec. 569. If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold and the proceeds of the sale shall be applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest; and in all cases where the proceeds of the sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs and assigns.

Sec. 570. The provisions herein contained, so far as the same shall be applicable, shall govern in actions for the foreclosure of chattels, mortgages, or bills of sale creating liens on personal property. The mortgagee or holder of the lien may proceed upon his mortgage or lien; if there be a separate obligation in writing to pay the same, secured by said mortgage or lien, he may bring suit upon such separate promise.

* * * * * * * *

The order of sale shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under such order of sale, the sheriff is authorized to levy upon and sell other property of mortgage debtor, not exempt from execution, for the sum remaining unsatisfied.

Sec. 571. In all actions of foreclosure when there is a decree for the sale of the mortgaged premises or property, and a judgment over, any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same order of sale. * * * Nothing herein shall prevent the issue of an execution, as in ordinary cases, either for the whole mortgage debt or such deficiency, after applying the proceeds of sale of mortgaged property. When, however, an execution shall issue upon a judgment recovered for a debt secured by mortgage, a schedule of the mortgaged property, real or personal, shall be indorsed upon such an execution, and the sale thereof under such order shall foreclose the equity of redemption or the mortgage therein.

Sec, 573. Judgments over from any deficiency, remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and

may be made a lien upon the property of a judgment debtor as other judgments, and the collections thereof enforced in the same manner.

From the Code of California, 1851 (see page 83):

TITLE VII.—Of the Execution of the Judgment in Civil Actions.

CHAPTER I.

THE EXECUTION.

§ 209. The party in whose favor judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

§ 210. The writ of execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff, and shall intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, the names of the parties, the judgment, and, if it be for money, the amount thereof and the amount actually due thereon, and shall require the sheriff substantially as follows:

1st. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or at any time thereafter.

2d. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3d. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4th. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party en-

titled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

§ 211. When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action. In other respects the writ shall contain the directions specified in the first subdivision of the last section.

§ 212. The execution may be made returnable at any time, not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll was filed.

§ 213. Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced.

§ 214. After the lapse of five years from the entry of judgment, an execution shall be issued only by leave of court or motion. Such leave shall not be given unless it be established by the oath of the party or other proof that the judgment or some part thereof remains unsatisfied and due.

See page 85:

§ 217. All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution. Until a levy, property shall not be affected by the execution.

See page 87:

§ 227. When the purchaser of any personal property capable of manual delivery shall pay the purchase-money, the officer making the sale shall deliver to the purchaser the property, and, if desired, shall execute and deliver to them a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title, and interest which the debtor had in and to such property on the day the execution was levied.

§ 228. When the purchaser of any personal property not capable of manual delivery shall pay the purchase-money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all the right, title, and interest which the debtor had in and to such property on the day the execution was levied.

§ 229. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption as provided in this chapter. The officer shall give to the purchaser a certificate of sale, containing—

1st. A particular description of the real property sold.

2d. The price bid for each distinct lot or parcel.

3d. The whole price paid.

4th. When subject to redemption it shall be so stated, a duplicate of which certificate shall be filed by the officer with the recorder of the county.

§ 230. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest:

1st. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2d. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners.

§ 231. The judgment debtor, or a redemptioner, may redeem the property from the purchaser within six months after sale, on paying the purchaser the amount of his purchase, with eighteen per cent. thereon in addition, together with the amount of any assessments or taxes which the purchaser may have paid thereon after the purchase and interest on such amount, and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien, with interest.

§ 232. If the property be so redeemed by a redemptioner either the judgment debtor, or another redemptioner may within six days after the last redemption again redeem it from the last redemption on paying the sum paid on such last redemption, with six per cent. thereon in addition, and the amount of any assessments or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and the amount of any liens held by said last redemptioner prior to his own, with interest, the property may

be again, and as often as the debtor or any redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption, with six per cent. thereon in addition, and the amount of any assessments or taxes which the said last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens held by the said last redemptioner previous to his own, with interest. Notice of redemption shall be given to the sheriff. If no redemption be made within six months after the sale the purchaser shall be entitled to a conveyance, or, if so redeemed, whenever sixty days have elapsed and no other redemption has been made and notice thereof given, the time for redemption shall have expired and the last redemptioner, shall be entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires the effect of the sale shall be terminated and he be restored to his estate.

§ 233. The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale, and a tender of the money shall be equivalent to payment.

§ 234. A redemptioner shall produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff:

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder.

2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto, and

3d. An affidavit, by himself or his agent, showing the amount then actually due on his lien.

§ 235. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property by order granted, with or without notice, on the application of the purchaser or judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor, or for the repair of fences, or for fuel in his family while he occupied the property.

§ 236. The purchaser, from the time of a sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof.

§ 237. If the purchaser of real property sold on execution, or his successer in interest, be evicted therefrom in consequence of irregularity in the proceedings concerning the sale or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the recovery be in consequence of the irregularity in the proceedings concerning the sale, the judgment may, by order of the court, upon notice to the judgment debtor, be revived, and a new execution issue for the price paid on the sale, with interest. Such judgment shall be a lien on the real estate of the judgment debtor only from the time of its revival.

TITLE VIII.—Actions in Particular Cases.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

See page 91:

§ 246. In an action for the foreclosure or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property, real or personal, the court shall have power, by its judgment, to direct a sale of the property or any part of it; the application of the proceeds to the payment of the amount due on the mortgage, lien, or incumbrance, with costs and execution for the balance.

§ 247. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

§ 248. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease, and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold; but if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance and the entire debt and costs paid, there being a rebate of interest when such rebate is proper.

From the Code of Iowa, 1851 (see page 269):

CHAPTER 110.

EXECUTION.

§ 1885. Judgments or orders requiringthe payment of money, or the delivery of the possession of property, are to be enforced by execution. Obedience to those requiring the performance of any other act is to be coerced by attachment for contempt.

§ 1886. Executions may issue at any time within five years from the entering of the judgment.

§ 1887. After the lapse of five years such execution can issue only after suing out a *scire facias* and obtaining the requisite order of the court thereon.

§ 1888. Executions from the district court may issue in the first instance into any county which the party ordering them may direct.

§ 1889. When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money cannot thus be sent, except by the direction of the party entitled thereto or his attorney.

§ 1890. The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties thereto, its amount and the amount still to be collected thereon, if for money, and, if not for money, it mnst state what specific act is required to be performed.

§ 1891. Where the judgment is against husband and wife the execution may issue against the property of either or both of them.

§ 1892. Stock or interests owned by the defendant in any company, and also debts due him, and property of his in the hands of third persons, may be levied upon in the manner provided for attaching the same, and the proceeding by garnishment shall be the same as nearly as practicable.

§ 1893. Bank bills and other things in action may be levied upon and sold or appropriated as hereinafter provided, and assignments thereon by the officer when necessary shall have the same effect as if made by the defendant, and may be treated as so made.

§ 1894. After the rendition of judgment any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

See page 273:

§ 1924. When real property has been levied upon, if the estate is less than a leasehold having two years of an unexpired term the sale is absolute. When the estate is of a larger amount the property is redeemable as hereinafter prescribed.

§ 1925. At the time of the sale the sheriff shall give to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, and stating that unless redemption is made within one year thereafter, according to law, he or his heirs or assigns will be entitled to a deed for the same.

§ 1926. The defendant may redeem such property at any time within one year from the day of sale, as hereinafter provided, and will in the meantime be entitled to the possession of the property.

§ 1927. For the first six months after such sale his right to redeem is exclusive, but if no redemption is made by him at the end of that time any creditor of the defendant whose demand is a lien upon such real estate may redeem the same at any time within nine months from the day of sale; but a mechanics' lien before judgment thereon is not of such a character as to entitle the holder to redeem.

§ 1928. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for redemption by creditors, may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due.

§ 1929. Creditors having the right of redemption may redeem from each other within the time above limited and in the manner herein provided.

§ 1930. The terms of redemption in all cases will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien with interest upon the whole at the rate of ten per cent. per annum, together with costs, subject to the exception contained in the next section. But where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, a rebate of interest at the rate of ten per cent. per annum must be made by such mortgagee on his claim.

§ 1931. When a senior creditor thus redeems from a junior he is required to pay off only the amount of those liens which are paramount to his own with the interest and costs appertaining to those liens.

§ 1932. But the junior creditor may in all such cases prevent a redemption by the holder of the paramount lien by paying off that lien, or leaving with the clerk beforehand the amount necessary therefor.

§ 1933. Whenever a senior creditor redeems from a junior creditor the latter may in turn redeem from the former, and so on as often as the land is taken from him by virtue of a paramount lien.

§ 1934. After the expiration of nine months from the day of sale the creditors can no longer redeem from each other except as hereinafter provided, but the defendant may still redeem at any time before the end of the year as aforesaid.

§ 1935. Unless the defendant thus redeems the purchaser or the creditor who last redeemed prior to the expiration of the nine months aforesaid will hold the property absolutely.

§ 1936. In case it is thus held by a redeeming creditor, his lien and the claim out of which it arose will be held to be extinguished unless he pursues the course pointed out in the next section.

§ 1937. If he is unwilling to hold the property and credit the defendant therefor with the full amount of his lien he must, within ten days after the expiration of the nine months aforesaid, enter on the sale book the utmost amount that he is then willing to credit on his claim.

§ 1938. Any unsatisfied lien creditor, within ten days after the expiration of the time thus allowed to make the entry required in the last section, may redeem the property by paying the amount of the legal disbursements of the last holder, as hereinbefore regulated, added to the amount thus entered on the sale book, together with interest and costs.

§ 1939. Such redemptioner shall also credit the defendant with the full amount of his lien, unless within ten days after redeeming as aforesaid he may likewise make a like entry on the sale book, in which case any other unsatisfied lien creditor may in like manner redeem within ten days, as aforesaid, and so on until there are no more unsatisfied liens or until the expiration of the year for redemption, the defendant having the final privilege of redeeming from the last redemptioner at the end of the year.

§ 1940. The mode of making the redemption is by paying the money into the clerk's office, for the use of the person thereto entitled. The person so redeeming, if not the defendant in execution, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim.

§ 1941. The clerk shall thereupon give him a receipt for the money, stating the purpose for which it was paid. He must also at the same time enter in the sale book a minute of such redemption, of the amount paid, and the amount of the lien of the last redemptioner as sworn to by him.

§ 1942. A creditor redeeming as above contemplated is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed.

§ 1943. When the property has been sold in parcels, any distinct portion may be redeemed by itself.

§ 1944. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

§ 1945. The rights of a defendant in relation to redemption are transferable, and the assignee has the like power to redeem.

§ 1946. If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person so entitled be dead, the deed shall be made to his heirs; but the property will be subject to the payment of the debts of the deceased in the same manner as if acquired during his lifetime.

§ 1947. The purchaser of real estate at a sale on execution need not place any evidence of his purchase upon record until twenty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is conclusive notice of the rights of the purchaser, but no longer.

§ 1948. Deeds executed by a sheriff in pursuance of such sales are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof.

§ 1949. When real estate has been sold on execution, the purchaser thereof or any person who has succeeded to his interest may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance.

§ 1950. Lands sold previous to the taking effect of the act shall be redeemed according to the laws heretofore in force.

§ 1951. The term "defendant" as herein used is intended to designate the party against whom, and the term "plaintiff" the party in favor of whom, any execution has issued.

§ 1952. The provisions of this chapter are intended to embrace proceedings in justice's court so far as they are applicable, and the terms "sheriff" and "clerk" are accordingly to be understood as qualified in this chapter in the same manner in this respect as in that relative to attachment.

See page 289:

CHAPTER 118.

FORECLOSURE OF MORTGAGES.

§ 2071. Any mortgage to secure the payment of money only, and when the time of payment is therein fixed, may be foreclosed by notice and sale as hereinafter provided, unless a stipulation to the contrary has been agreed upon by the parties.

§ 2072. The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale.

§ 2073. Such notice must be served on the mortgagor and upon all persons having recorded liens upon the same property which are paramount to the mortgage, or they will not be bound by the proceedings.

§ 2074. The service and return must be made in the same manner as in case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication.

§ 2075. After notice has been served upon the parties it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner.

§ 2076. The purchaser shall take all the title and interest on which the mortgage operated as a lien.

§ 2077. The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property or a deed of the real estate, which shall be respectively effectual to carry the whole title and interest purchased.

§ 2078. The deeds of real estate must be acknowledged and recorded like deeds for lands sold on execution.

§ 2079. Evidence of the service and publication of the notice aforesaid and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof.

§ 2080. Such affidavits shall be attached to the bill of sale of personal property or recorded with the deed of real property, and shall then be receivable in evidence to prove the facts they state.

§ 2081. Sales made in accordance with the above requirements are valid in the hands of a *bona fide* purchaser, whatever may be the equities between the mortgagor and mortgagee.

§ 2082. The rights of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue if necessary.

§ 2083. The holder of any mortgage may in all cases, and when the mortgage is given for any other purpose than to secure the payment of money at a day certain, he must proceed by civil action in the district court when he wishes to foreclose the same.

§ 2084. If anything be found due the plaintiffs the court shall render judgment therefor and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the amount due, with interest and costs. A special execution shall issue accordingly.

§ 2085. If the mortgaged property does not sell for sufficient to justify the execution, a general execution may be issued against the mortgagor unless the parties have stipulated otherwise.

§ 2086. If separate suits are brought on the bond or note and on the mortgage given to secure it, the plaintiff must elect which to prosecute; the other will be discontinued at his costs.

§ 2087. When a judgment is obtained in an action on the bond the property mortgaged may be sold on the execution issued thereon, and the judgment shall be a lien thereon from the date of the recording of the mortgage.

§ 2088. At any time prior to the sale made in accordance with either of the above modes of foreclosure, a person having a lien on the property which is junior to the mortgage will be entitled to an assignment of all the interest of the holder of the mortgage by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure or discontinue it at his option.

§ 2089. If there is an overplus remaining after satisfying the mortgage and costs, and if there are no other liens upon the property, such overplus shall be paid to the mortgagor.

§ 2090. If there are other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order; and if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such the balance will be paid to the mortgagor.

§ 2091. As far as practicable the property sold must be only sufficient to satisfy the mortgage foreclosed in either of the methods aforesaid.

§ 2092. The same costs and fees shall be allowed for services rendered and acts performed under the provisions of this chapter as for like acts and services in other cases, which will be paid out of the proceeds of the sales made.

§ 2093. Whenever the amount due on any mortgage is paid off, the mortgagee or those legally acting for him must acknowledge satisfaction thereof in the margin of the record of the mortgage. If he fails to do so within six months after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars.

§ 2094. The vendor of real estate, when part or all of the purchase-money remains unpaid after the day fixed for payment, whether time is or is not the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property.

§ 2095. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner.

§ 2096. Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and sales made in accordance with their terms are valid; or they may be treated like mortgages, and foreclosed by action in the district court.

§ 2097. Nothing herein contained is intended to prevent parties from fixing their own terms to any contract and prescribing the manner in which those contracts shall be enforced, nor to change the rules or affect the rights of the vendor of real estate in those cases where time is of the essence of the contract.

Office Supreme Court U. S.
FILED.
JAN 24 1889
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 157.

HOLLON PARKER, Appellant,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS ET AL.

Appeal from the Supreme Court of the Territory of Washington.

JOHN H. MITCHELL,
Solicitor for Appellant.

Thomas McGill & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1888.

HOLLON PARKER, Appellant,
vs.
GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, *et. al.*
No. 157.

Appeal from the Supreme Court of the Territory of Washington.

Brief of JOHN H. MITCHELL on the part of the Appellant.

STATEMENT OF CASE.

This is an appeal by Hollon Parker, who was plaintiff in the court below, from a judgment rendered in the above-entitled case by the Supreme Court of the Territory of Washington, on August 4th, 1885, whereby the judgment of the District Court of the First Judicial District of the Territory of Washington was affirmed.

The appellant, as plaintiff in the court below, brought a suit in equity to redeem property sold under a decree of the District Court. The complaint, which was filed May 15th, 1884, (Record, p. 3,) but as subsequently amended May 21st, 1885, (Record, pp. 6, 7, 8,) alleges, in substance, that on the 28th day of December, 1874, and ever since, the appellant was the owner in fee of the prop-

erty described in the complaint, which property consisted of several distinct lots and parcels lying and being in the County of Walla Walla, Washington Territory, and each of which parcels were particularly described in such complaint; that all said premises at the time aforesaid were subject to a decree recovered by one Joseph Petrain against Edward Shiel, the city of Walla Walla, W. B. Thomas, John F. Abbott, and D. Buroker, in an action in the District Court of the First Judicial District of Washington Territory; that on the 12th day of January, 1875, under and by virtue of said decree all said property was sold by the sheriff at public auction; that the same, in separate lots, was purchased at such sale by the respective defendants, the complaint describing specifically the particular part or parcel purchased by each defendant; that afterwards, and before the expiration of six months from the confirmation of said sale, the plaintiff, after giving the defendants due and legal notice that he would apply to the proper sheriff of the county, at a time specified in such notice, to redeem all said property, tendered to the sheriff of Walla Walla County, in his office, during office hours, and at the time specified in the notice to defendants, the amount of money necessary to redeem the same; that the said sheriff refused to receive the money so tendered, or to *recognize the right of appellant to redeem said parcels of land, or any part thereof*, and that the appellant, as stated in the complaint, "now brings into court and deposits with the clerk the amount of money so tendered to the sheriff."

The complaint further alleges that long prior and more than two days before the making of the aforesaid tender the defendants *notified plaintiff that they would not permit him to redeem said property;* and such complaint further states that they unlawfully and wrongfully, on the 2d day of January, 1875, severally entered

and took possession of said premises so purchased by them at such sale, and have ever since and now hold the same.

The complaint further alleges that by reason of such refusal to allow plaintiff to redeem said property, and by reason of defendants having possession of the same as stated, he has been damaged in rents, issues, and profits in certain amounts specifically specified in such complaint.

The complaint further states that said defendants, each and all of them, hold, respectively, sheriff's deeds for said real estate, and that the same are entered of record in the Auditor's office as public records of Walla Walla county, Washington Territory, and which deeds, it is alleged in such complaint, "are fraudulent and void."

The complaint concludes with the prayer—

1. That any and all deeds executed as aforesaid for said property under and by said sale and under and by virtue of said decree be declared null and void, and that the sheriff of Walla Walla county, as such sheriff and as a commissioner appointed by the court, be directed to make, execute, and deliver to plaintiff a good and sufficient deed to and for said property.

2. That the plaintiff have and recover of and from defendants his rents, issues, and profits as damages for the use of such premises in certain amounts specified, and for such other and further relief as may seem meet and equitable to the court.

To this amended complaint defendants demurred in the District Court and assigned as reasons the following:

1. That the amended complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united in said amended complaint. Wherefore it is asked that said action be dismissed.

On May 28th, 1885, the following judgment was entered in the District Court (Record, p. 11):

"This cause came on for hearing on the demurrer filed herein to plaintiff's amended complaint, and after argument of counsel, the court sustained the demurrer, and the plaintiff then stated that he did not wish to further amend. Therefore, on motion of defendant's attorneys, it is considered and adjudged that this action be dismissed at the costs of plaintiff; and it is further considered and adjudged that the defendant have and recover of and from the plaintiff the costs of this action taxed at $53.95, and that execution issue therefor."

From this judgment an appeal was taken to the Supreme Court of the Territory of Washington, where, on the 4th of August, 1885, the judgment of the District Court was affirmed with costs. From this latter judgment the cause is here on appeal.

Assignment of Errors.

1. The court erred in sustaining the demurrer of the appellees, defendants in the court below, to the amended complaint.

2. The court erred in affirming the judgment of the court below in sustaining the defendant's demurrer to plaintiff's amended complaint, dismissing plaintiff's appeal, and rendering judgment against appellant for costs.

3. The court erred in failing to reverse the judgment of the District Court which sustained the demurrer to plaintiff's amended complaint. (See Record, p. 15.)

BRIEF AND ARGUMENT.

The principal question involved in this case is as to whether the appellant as the owner in fee of the property described in the complaint had a right under the then existing law to redeem the property sold on the decree recovered by Joseph Petrain against Joseph Shiel *et al.* in an action in the District Court of the First Judicial District of Washington Territory. If he had, then it is clear the demurrer to the effect that the amended complaint does not state facts sufficient to constitute a cause of action is not well founded.

This depends upon the construction to be placed upon the 33d chapter of the Civil Practice Act of the Territory of Washington, approved November 13th, 1873. This chapter (pp. 94–104, inclusive) provides in detail for the sales of property, real and personal, under execution; *and* for *redemption* in cases of *all sales of real estate* sold when the estate sold is a leasehold of two years or greater. Section 364 of that act provides as follows:

"Upon a *sale of real property* when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In *all other cases* such property *shall be subject to redemption*, as hereinafter provided in this chapter. At the time of sale the sheriff shall give to the purchaser a certificate of the sale containing—

1. A particular description of the property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it shall be so stated.

The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ."

While section 365 of the same act designates the persons entitled to redeem in the following language:

By Whom Redemption May be Made.

"Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest—

1. The judgment debtor or his *successor in interest*, in the whole or any part of the property separately sold.

2. A creditor having a lien by judgment, decree, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision 2 of this section are termed redemptioners."

While section 366 provides the *manner* in which the redemption shall be made, as follows:

"Section 366. The judgment debtor or redemptioner may redeem the property within six months from the date of the order confirming the sale, by paying the amount of the purchase-money, with interest at the rate of 2 per centum per month thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon; and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien, with interest."

Section 367 provides for further redemptions by other judgment creditors, &c.

While section 368 provides that if no redemption be made within *six months from the confirmation of the sale*, the purchaser shall be entitled to a conveyance from the sheriff, &c.

Section 369 provides specifically as to the mode of redeeming, as follows:

"1. The persons seeking to redeem shall give the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose. At the time and place specified in such notice such person may redeem by paying to the sheriff

the sum required. The sheriff shall give the person redeeming a certificate as in case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff, in evidence of his right thereto, as follows:

2. Proof that the notice required by this section has been given to the purchaser or redemptioner, or waived.

3. If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified by the clerk of the court where such judgment or decree is docketed, or, if he seeks to redeem upon mortgage, the certificate of the record thereof.

4. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent, showing the amount then actually due on the judgment, decree, or mortgage. * * *"

So far as disclosed by the record in this case—that is to say, by the complaint and amended complaint, and, in fact, by the whole record aside from a statement in the opinion of Associate Justice Turner—the nature of the judgment or decree rendered in favor of Joseph Petrain against Edward Shiel *et al.* is not disclosed further than this—that it was "a decree recovered" by said Petrain against Edward Shiel, and others, in "an *action* in the said District Court" (Record, p. 6); and further, that it was evidently a decree for a certain amount—just what amount does not appear—of money, as on page 7, Record, we find the statement in the complaint that when Parker, the appellant, applied to the sheriff to redeem the property he presented to said sheriff "a certified copy of the decree in the case, wherein Joseph Petrain was plaintiff and Edward Shiel, the City of Walla Walla, W. B. Thomas, John F. Abbott, and D. Buroker were defendants, and papers *showing the amount still due on the decree in the last aforesaid cause of action.*" So far, therefore, as dis-

closed by the complaint or the amended complaint or the demurrer, the court was not advised, nor is this court informed as to whether that decree was rendered in a suit to foreclose a mortgage, or in an action, or suit brought for some other and different purpose. It was a decree, however, impressing a lien for a certain amount of money on this property—a decree subjecting all this property to its payment, whatever may have been the cause of action or suit.

It is true, the Supreme Court justice, in his opinion, assumes (page 18, Record) that the property described in the complaint was "sold under a decree of the District Court *foreclosing a mortgage;*" and this argument shall proceed on the assumption that the sale of the property in question was *not* by execution on judgment, but on a decree rendered in a suit for the foreclosure of a mortgage.

The plain question, then, for this court on this record is simply this: Had Hollon Parker, the appellant, as the owner in fee of the property described in the complaint, and the successor in interest of the mortgagor, a right under the statutes just quoted to redeem the property, subject to a decree for the payment of money in a foreclosure suit, where such property has been sold by the sheriff at public auction under and by virtue of such decree?

The court will observe there is no exception whatever in section 364 of the Civil Practice Act of 1873 of any case wherein there is no redemption where there has been a sale of real property when the estate sold, no matter *how* it was sold, is greater than a leasehold of two years' unexpired term. The statute (section 364) says "upon a sale of real property;" *not*, it will be observed, upon a sale on *execution*, or on a *decree*, or upon an *order* of the court, but upon "a sale of real

property," which must be held to mean *all sales of real property*, when the estate is less than a leasehold of two years' unexpired term the sale shall be absolute, while "in all other cases"—not, it will be seen, in all other cases of *sales on execution*, but in *all other cases of sales of real property*—that is, in *all* cases of sales of real property where the interest sold is not less than a leasehold of two years' unexpired term, "such property," that is, the property so sold, "*shall be subject to redemption*, as hereinafter provided in this chapter."

It is true many of the preceding sections speak of the sale of property on execution, but section 364, and in fact all the sections relating to the *right of redemption* do not limit that right to cases where the sales have been on execution, but extend it to all cases of sales of real property where the interest sold is equal to or greater than a leasehold of two years' unexpired term. It is plain, therefore, that these sections of the Civil Practice Act of 1873, providing for the redemption of real property, were intended to include all sales of real property made under any judgment or decree of any court.

Assuming, therefore, that the decree in this case was a decree rendered in a suit to foreclose a mortgage, it is respectfully insisted that the right of redemption attached by virtue of the sections of the statute just quoted.

Force is added to this construction by the fact that the Legislature in the Code of 1881 provided in express terms (section 379 of that code) that sales of property on decrees of foreclosure of mortgage should be absolute, and that the right of redemption should not exist in such cases. The only exception made in which the right of redemption did not attach in the Code of 1873

was cases where the interest sold was less than a leasehold, as stated, while the Code of 1881 makes the additional exception of sales on foreclosures of mortgages.

The law regulating the right of redemption on sales under execution clearly applies to sales under foreclosure.

Kent & Kahoon *v.* Lappan, 2 Cal., 595.
McMillan *v.* Richards, 9 Cal., 365.
Besser *v.* Hawthorn, 3 Oreg., 129.

Section 365 of the Washington Code, *supra*, gives the appellant, it is insisted, the right to redeem; while section 366 limits the time of redemption to six months from the date of the order confirming the sale.

Campbell *v.* Guinlin, 4 Ill., 288.
3 Scramm., 288.
State *v.* Mason County, 41 Mo., 453.
Draper *v.* Emerson, 22 Wis., 147.

THE STATUTE WAS BORROWED FROM A CALIFORNIA STATUTE, AND THE CONSTRUCTION OF THE CALIFORNIA COURTS SHOULD PREVAIL.

The Civil Practice Act of Washington Territory, approved November 13th, 1873, under which the proceedings in this case were had, is in substance and effect, and in fact almost literally, a copy of the California statute (Laws of California, 1850–1853, p. 561) upon the subject of sales on execution and decrees in foreclosures of mortgages; and in reference to the subject of redemption, or right of redemption attaching to the judgment debtor, and certain specified lien holders upon public sales of real property.

Sections 229–234 of the California act, (Laws of California, 1853,) relating to redemptions on sales of property, are identical in language with the laws of Washington Territory, *supra*

For many years the Supreme Court of the State of California have adhered to, and still adhere to, a construction of this statute such as I now insist upon, and which was first given to that statute by the Supreme Court of the State of California in the case of Kent & Cahoon, appellants, *v.* Laffan, respondent, 2 Cal. R., 596. There one of the principal questions was whether section 229 of the California Practice Act, which is precisely similar to section 364 of the Washington statute relating to the redemption of real property, included within its design sales of real estate under decrees of foreclosure of mortgages, and the Supreme Court in that case, Heydenfeldt, J., delivering the opinion, Murray, C. J., concurring, said:

"I think the language of this act is sufficiently comprehensive to include within its design sales of real estate under decrees of foreclosure of mortgages. A contrary doctrine might be held by an ingenious and technical construction of that portion of the act which regulates executions upon judgments. But in all such cases I consider it safest to look to the obvious policy of the law, and to maintain such policy against a mere hesitation caused by the inapt language of the act. This is also the application of the common-law principle, which declares that remedial statutes shall be beneficially construed."

Again, in McMillan *v.* Richards, (9 Cal., 412,) this question was again before the Supreme Court of that State. Mr. Justice Field, of this court, then a justice of the Supreme Court of the State of California, delivered the opinion of the court, Terry, C. J., and Burnett, J., concurring. In that opinion Mr. Justice Field said:

"And by the decision in Kent *v.* Laffan (2 Cal., 595) the statutory right is held equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law. Whether this decision would

be now made were the question an open one it is unnecessary to determine. It has been repeatedly recognized as law by this court (Harlan *v.* Smith, 6 Cal., 173) and has been acted upon by parties for years; rights of property have been acquired under it, which we are not at liberty at this day to disturb. By this decision the estate of the mortgagor and of the judgment debtor after sale stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption is a useless formula, which cannot enlarge the effect of the decree or any rights of the mortgagee under it."

It was therefore held, furthermore, in the case of McMillan *v.* Richards, *supra*, that a creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquired a lien on the estate entitling him to redeem; and, furthermore, the court in that case declared that:

"Such lien and right to redeem would be lost where a prior judgment had been obtained by a third party against the mortgagor, under which his estate, subject to the mortgage, had been sold, *and the time for redemption had lapsed*, and a conveyance had been executed."

And further—

"That the legal estate exists in the judgment debtor *after the expiration of the time to redeem* until execution of the conveyance to the purchaser."

The Washington Territory provisions of the Civil Practice Act of 1873, having been taken bodily from the provisions of the California statute upon that subject twenty-one years after the passage of the latter act, which act has been construed time and time again by the Supreme Court of California, as above indicated, it is but reasonable to suppose, not only that the legislature of the Territory of Washington intended, as the

language used, construed in the light of the California decisions, would indicate, that this act should be construed as the act from which it was taken in the State of California had been by repeated decisions of the Supreme Court of that State; but, also, that parties executing mortgages in the Territory had a right to expect that any right, including the right of redemption after sale in the case of a mortgage foreclosure, and sale, should attach to and belong to them, which, in the State of California, persons were permitted to exercise under a similar statute in that State.

In the case of Cahoon *v.* Laffan (2 Cal., 596, *supra*) the distinguished counsel for appellant, the late Mr. Hall McAllister, in presenting the case to the Supreme Court, remarked as follows:

"There is a distinction between the statute of New York and that of California; the former treats exclusively of writs of *fi. fa.*, and other executions known to the common law, and does not extend to sales of property by foreclosure under mortgage. The 229th section of the act to regulate proceedings in civil cases expressly provides that upon a sale of real property, when the estate is less than leasehold, &c., the sale shall be absolute. In all other cases the real property shall be subject to redemption," &c.

And then the learned counsel remarked as follows:

"And this is said in the *same act* that treats of the foreclosure of mortgages."

So here, it may be said, the corresponding section, that is, section 364, in the Civil Practice Act in the Washington Territory Code of 1873, is a part also of the *same act*, which treats of the foreclosure of mortgages in Washington Territory, (see p. 149, Laws of Washington, 1873,) being a part of the Civil Practice Act of that Territory of November 13th, 1873.

There is nothing in the sections of this act relating to foreclosure of mortgages in any manner indicating that all sales under decrees of foreclosure of mortgages should be *absolute*, and that there should be *no right* of redemption to any one in such a case *after sale;* and, inasmuch as the *same act* in a *prior section* (sec. 364) had treated of the general subject of the right of *redemption* of real estate *after* public sale, providing that in *all cases of sales of real property*, except where the estate sold was only a certain specified leasehold, it is clear there was no necessity for repeating the redemption clause in the sections of the act relating to foreclosure of mortgages in order to subject property sold on foreclosure of mortgage to redemption. Therefore, in the absence of any clause exempting such property from redemption, the same rule must be held to apply to real estate sold on a foreclosure of mortgage as to real estate sold on execution.

It is true Mr. Justice Field, in the case of Gross *v.* Fowler, (21 Cal., 395,) decided in 1863, expressed doubt as to the correctness of the construction placed upon the California statute in the case of Kent *v.* Laffan, (2 Cal., 595,) but still adhered to the ruling in the following language:

"But admitting this to be true, it is too late to interfere with it; rights of property have grown up under the decision which no court is at liberty at this day to disturb. If a different rule is to be established hereafter, it must be by legislative enactment."

And subsequently, in 1866, the Supreme Court of California, Sawyer, J., in Page *v.* Rogers, (31 Cal.,) recognized the rule without any criticism whatever as to the correctness of the original construction of the statute, or without placing it on the doctrine of *stare decisis.*

It is submitted, if the court please, that the reason given by Mr. Justice Field in Gross *v.* Fowler, *supra*, for adhering to a construction the original correctness of which he doubted, applies with equal force to the case at bar, and argues with equal emphasis in favor of maintaining the same construction of the Washington Territory statute, that was placed on a precisely similar statute in California. And this for the simple reason that the Washington Territory statute was taken bodily from the California statute twenty-one years after the decision of the Supreme Court of California, in Kent *v.* Laffan, (2 Cal., 595, *supra*,) giving a construction to such statute, and which construction had been adhered to without variation by that court down to 1873, when the Washington Territory statute was enacted.

The familiar rule that when one State enacts a statute of another State, it is presumed to adopt the construction which that statute has received by a uniform series of judicial expositions in the courts of the State from which it is taken, is applicable in the case at bar.

Campbell *v.* Quentin, 4 Ill., 289.
Little *v.* Smith, 4 Scramm, 402.
Rigg *v.* Wilton, 13 Ill., 15.
Draper *v.* Emerson, 22 Wis., 150.
Ex rel. Mo. & Miss. R. R. Co., *v.* Macon County, 41 Mo., 445

In the Case of Campbell *v.* Quentin, (4 Ill., 289,) *supra*, the Supreme Court of Illinois said:

"The act is substantially a copy of an Indiana statute which had been in force for many years and received a definite, certain, and settled construction in the courts of justice of that State, and the reports published to the world prior to the adoption of this statute by our legislature. It is a safe rule, peculiarly applica-

ble to the case before us, that when one State enacts a statute of another State, it is presumed to adopt the construction which that statute has received by a uniform series of judicial expositions in the courts of the State from which it is taken."

In Draper *v.* Emerson, (22 Wis.,) *supra*, the court said:

"It is a settled rule in the construction of statutes that when a statute has received a judicial construction in another State, and is then adopted, it is taken with the construction which has been so given to it."

In the case of The State *ex rel.* Mo. & Miss. R. R. Co. *v.* Macon, (41 Mo.,) *supra*, the Supreme Court of Missouri said:

"It is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they were passed. (Jones *v.* Brown, 2 Exch., 332, per Pollock, J.) The Ohio Constitution of 1851 contains a provision or prohibitory clause which is couched in the precise language of the prohibitory clause of our own constitution now under consideration. This clause received a judicial interpretation by the highest tribunal of Ohio in Cass *v.* Dillon, in 1853, which has been repeatedly affirmed by the courts of that State in a course of decisions running through a period of twelve years prior to the passage of our own constitution. We cannot suppose that this identity of language in the constitutional provisions of two great States was the result of chance merely, neither can we suppose that our convention were ignorant of the interpretation which had been given this clause by the courts of Ohio. On the contrary, the presumption is that our convention borrowed this clause from the Ohio constitution, and that they *well knew* and *approved of the interpretation* which had been placed upon it by the courts of that State."

So here the presumption is violent that the sections of the Washington Territory statute on the subject un-

der discussion were *borrowed* from the California statute on the same subject, and furthermore that the Washington Territorial Legislature *well knew* and *approved of the interpretation which had been placed upon it by the Supreme Court of California.* This being so, it is fair to presume that parties—mortgagors and mortgagees, purchasers and lien-holders—in Washington Territory have acted in their transactions during the years between the dates of the Washington Territory act of 1873 and the passage of the Code of Washington Territory, in 1881, in the belief that the law of Washington Territory of 1873 relating to redemption was as uniformly construed by the Supreme Court of the State of California, and that, therefore, although neither the Supreme Court of Washington Territory nor, perhaps, any of the courts of that Territory had passed upon the question, it may with equal propriety be said, using the language of Mr. Justice Field in Gross *v.* Fowler, 21 Cal., *supra*, that "it is too late to interfere with it. Rights of property of vast value have grown up under the decision, which no court is at liberty at this day to disturb."

The Legislature of Washington Territory saw proper to change the rule in the only proper way it could be changed—that is, by statutory enactment, when they adopted the Code of Washington Territory, approved December 7th, 1881. In that code, section 379, p. 100, it was provided, in subdivision 2, as follows:

"When such execution or other process issues upon a decree for the foreclosure of a mortgage, such sheriff or other officer shall execute or deliver such deed within five days after the confirmation of such sale";—

thus cutting off the six months' right of redemption that attached in favor of a debtor or lien creditor under section 364 of the act of 1873.

The Common-Law Right of Redemption.

It is not contended, nor indeed could it be, that there is any provision in the statute of 1873 affirmatively cutting off the common-law right of redemption that attaches in the absence of a statutory provision on the subject. Conceding, therefore, that the statutory provision relating to the redemption of property sold on execution does not apply to sales of property under a decree of foreclosure, then the common-law right of redemption would still remain.

The statute of Washington Territory relating to foreclosure of mortgages provides for an ordinary suit in equity upon the part of the mortgagee to foreclose the equity of redemption. (See Ch. L., pp. 149–152 Laws of Washington Territory, 1873.) There is nothing in these provisions relating to suits for foreclosure that in any manner prescribes a different rule of procedure, *in so far as the character of the decree is concerned*, from that attaching under the practice of the High Court of Chancery in England. In other words, in the absence of any statutory provision on the subject of redemption after a decree of foreclosure, the common-law rule, whatever that is, should apply. This rule of the common law was distinctly stated by this court in the case of Clark *v.* Reyburn, 8 Wall., 319, opinion by the late Mr. Justice Swayne.

It is true that was an appeal from a decision of a Circuit Court of the United States in a case wherein the mortgagee brought suit to foreclose the equity of redemption of certain assignees of the mortgagor who were not parties to a prior foreclosure suit brought against the mortgagor alone. But the rule of the common law, as stated in that case, must be held to be applicable to all other cases, whether in the United States, or State, or

Territorial courts, unless indeed there be some statutory provision to the contrary, and we have endeavored to show that in the case of Washington Territory there is no statutory provision to the contrary, unless indeed the sections relating to redemption of land sold on execution apply to sales made in a decree of foreclosure, which is the contention of the appellant herein.

In the case of Clark *v.* Reyburn, (8 Wall.,) *supra*, this court, among other things, said:

"After the practice grew up of applying to the Chancellor to foreclose the right to redeem upon default in payment of the debt at maturity, it was always an incident of the high remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the Chancellor, according to the circumstances of the case. It was only in the event of final default that the foreclosure was made absolute. * * * *The settled English practice is* for the decree to order the amount due to be ascertained, and the costs to be taxed; and that upon the payment of both *within six months* the plaintiff shall reconvey to the defendant, but in default of payment within the time limited, 'that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises.'"

This court proceeding further in the case of Clark *v.* Reyburn, said:

"We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the Chancellor, and to be regulated by the circumstances of the particular case; *but he nowhere intimates that such an allowance could be entirely withheld.* The practice in Illinois is in conformity to these views. In the light of these authorities we are

constrained to hold the decree in the case before us fatally defective. (Perine *v.* Dunn, 4 Johnson, 140; Johnson *v.* Donnell, 15 Ill., 59.)"

The reason the decree in the above case—Clark *v.* Reyburn—was held to be fatally defective was two-fold—*first*, because the decree did not find the amount due; and, *second*, because the *decree allowed no time for the payment of the debt and the redemption of the estate*, but was final and conclusive in the first instance, and *this* this court in that case held cannot be done in the absence of some special law authorizing it, and that no such special law existed in Kansas from which district the case came.

This argument proceeds, of course, upon the assumption, which I think is warranted, although the amended complaint is not on this point as specific as it might have been, that it appears from the record in this case that no time was given for redemption in the decree of the court under which this property was sold. It seems quite plain from the whole record, including the opinion of the Supreme Court in the case, that it was *conceded* by all parties, *including the court*, that the decree was *absolute* in the *first instance.*

The opinion of the court clearly assumes that such is the case in its insistance that no such condition is necessary in a decree of foreclosure. The court (Record, 20) says:

"When the security is ample no doubt a court of equity, by virtue of its inherent power, may impose as a condition of sale the right of the mortgagor to redeem upon proper conditions within a certain time. But, in the absence of any such condition in the decree of foreclosure, the sale is absolute."

And it clearly appears from the record that no time whatever was given for redemption in the order confirming the sale.

THE SUFFICIENCY OF THE AVERMENT AS TO TENDER.

It is suggested that the averment of tender in the amended complaint in this record is not sufficient. This contention, it is submitted, cannot be maintained, for two reasons: 1st. Because it is averred in the amended complaint (Record, p. 7) that the plaintiff "tendered to George F. Thomas," who, it is alleged in said amended complaint, was the sheriff of Walla Walla county, "in United States legal tender, the amount necessary to redeem said property described; that this tender was made on the 10th day of November, A. D. 1875, at his office in Walla Walla City, Walla Walla County, Washington Territory, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of said day."

It is further alleged that—

"The said George F. Thomas was then and there the duly elected and qualified and acting sheriff in and for said county and Territory, and that as such sheriff then and there at the time last aforesaid, refused to receive said tender or any part of the money thereof tendered, and the plaintiff now pays the same into this court and deposits the same with the clerk of this court."

This, it is submitted, was a sufficient tender.

Perhaps a motion to compel the plaintiff to make his complaint more *specific* might have been properly made, but it is submitted it was not obnoxious to a demurrer.

But, secondly, the contention cannot be maintained from the fact that it is alleged in said amended complaint (Record, p. 7) as follows:

"6th. That long prior and more than two days before the making of the aforesaid tender, defendants notified plaintiff that *they would not permit him to redeem said property*, and they unlawfully and wrongfully, on the second day of January, 1875, entered into and took possession of said premises and have ever since held the same."

From the foregoing it will be seen no question was raised by the sheriff or anyone else that a sufficient amount of money required by the statute to redeem was not tendered, but, upon the contrary, the tender was refused because of the fact that the appellee insisted that the appellant had no right whatever to redeem under the law. In view of these facts, he cannot be heard now protesting as to the sufficiency of the tender, even were the allegations in the complaint as to tender much less specific and definite than they are.

Is there a Misjoinder of Parties?

The point raised by the second ground of demurrer, viz., "that several causes of action have been improperly united in said amended complaint," does not appear to have been insisted upon in the court below, and was not considered by the Supreme Court or, in fact, referred to in any way in its opinion.

It is clear if the right of redemption attached to appellant and was denied him, as alleged in the complaint, then a court of equity has jurisdiction and power to extend relief in one suit. There was but one decree and one sale, although different parcels purchased by different persons; there is but one plaintiff, who, through the wrongful act of an official, the sheriff of the county, has been deprived of a substantial right, and by virtue of which several persons have come into possession, respectively, of the different parcels of property in question. There is, therefore, but *one* cause of action, and not several, stated in the complaint.

The Statute of Limitations.

The Supreme Court of Washington Territory, in its opinion in this case, held, among other things, that, inasmuch as the cause of action, if any, in the plaintiff, accrued in the year 1875, and that the complaint in this case was not filed until May 15th, 1884, some nine years thereafter, and inasmuch as it is insisted the statutory limitation for such an action is but two years, that therefore the claim was barred by the statute of limitations.

It is respectfully submitted this holding was not warranted by anything in the record. The question of the statute of limitations was not raised by the demurrer in this case (see Record, p. 9); nor, indeed, could it have been, from the fact that the Washington Code (see p. 47, Washington Code, 1881) in specifying the grounds upon which a defendant may demur to a complaint does not include as one ground that it appears upon the face thereof that the action was not commenced within the period fixed by the statute of limitations.

It is submitted the question of limitations under the Washington code can only be raised by answer. This being so, that question was not before the court on this record.

But as a matter of fact this suit was not barred by the statute of limitations. Section 26 (Laws of 1873, page 8) applies to this case. The same rule applies in suits in equity to redeem that applies in actions at law, and the decree of foreclosure and sale in this case is fatally defective in not fixing the time for redemption at six months. In all cases "when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute; in all other cases, such property

shall be subject to redemption." The limitation would commence to run at the expiration of six months from the time of sale.

Boone on Mortgages, Sec. 162 and notes.
Clark *v.* Reyburn, 8 Wall., 318.
Knolton *v.* Walker, 13 Wis., 264.
Elmendorf *v.* Taylor, 10 Wheat., 168.
Lock *v.* Caldwell, 91 Ill., 417.
Bowles *v.* Duff, 43 N. Y., 469.

Hubbell *et al. v.* Sibley, 50 N. Y. Court of Appeals, 471, and Miner *v.* Beekman, *Id.*, 337, referred to by Mr. Justice Turner in his opinion in the case under consideration, were cases where the defendants in their answers pleaded the statute of limitations. They are cases, moreover, arising under a different statute, and are not applicable to this case.

APPELLANT DID NOT MISTAKE HIS REMEDY.

The plaintiff was not compelled to pursue the statutory remedy against the sheriff. It is merely a cumulative remedy, and does not deprive the plaintiff of his common-law right of action against the purchaser, who is the real party in interest, and any proceedings had against the sheriff would only result in an interlocutory order, which would not be a final judgment on the merits between the plaintiff and the purchasers.

Freeman on Judgments, secs. 14, 15.
Idem, 251, 252.
People *v.* Craycroft, 56 Am. Dec., 331.
Ann Haviland *v.* David Holstead, 37 N. Y., 643.
Jones on Mortgages, sec. 1100.
5 Oreg., 322.

The only remedy of a mortgagor, or his assignee after payment of the debt, if the mortgagee, having entered

for condition broken, refuses to relinquish possession of the mortgaged premises, is by suit in equity.

Brobst *v.* Brock, 10 Wall., 519.
Smith *v.* Orton, 21 How., 241.

If we are correct in our contention that a statutory right to redeem existed here, then it is insisted that is not a mere shadowy right for which there is no remedy, but a substantial property right. It is a right that enters into the contract and becomes a rule of property; and in this, as in all similar cases, as was remarked by Mr. Justice Strong in delivering the opinion of this court in Swift *v.* Smith, 102 U. S., 442—

"The right to redeem should have been preserved in the decree. For this error, as well as for the mistake in the amount adjudged to be due the complainant, the decree must be reversed."

United States *v.* Fox, 94 U. S., 315.
Brine *v.* Insurance Co., 96 U. S., 636.
Swift *v.* Smith, 102 U. S., 442.

The case of Burley *v.* Flint (105 U. S., 248) is not in conflict with this view, but supports it. In that case, as stated by Mr. Justice Miller in the opinion—

"He does not offer to redeem, by payment of the amount due on the original mortgage, or to pay the amount bid at the sale by Flint, nor tender any sum as assurance that he would do so. He simply and purely asks that so much of the decree as forecloses this statutory right to redeem may be reviewed and reversed. * * * If he desired to avail himself of the right of redemption purely statutory, he should bring himself within the terms of the statute."

Courts are slow to sanction any proceedings—either between the parties themselves or in the courts—the effect of which will be to destroy that equity of redemption which is inseparable from the mortgage.

Story's Eq. Jur., 4th Ed., p. 358, sec. 1019.
Newcomb *v.* Benham, 1 Verm., 232.

Courts have uniformly held strongly in favor of the right to redeem.

Henry *v.* Davis *et al.*, 7 Johns. Ch., 40.
Conway's Ex's *v.* Alexander, 7 Cranch, 218.
Holbridge *v.* Gillespie, 2 Johns. Ch., 30.

The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it.

Bigler *v.* Waller, 14 Wall., 297.
Shillaber *v.* Robinson, 97 U. S., 68.
Chicago, D. & V. R. R. Co. *v.* Fosdick, 106 U. S., 47.

Nearly every State in the Union gives by unequivocal statutory provision the right to redeem after sale—some six months, others twelve; and the Legislature of Washington Territory, after cutting off the right that existed, as I insist, under the act of 1873, by the Code of 1881, restored the right and extended it to *twelve* months by an act approved February 3d, 1886, (Laws of Washington, 1885–6, page 116,) as follows:

"SEC. 1. That the judgment debtor, or his successor in interest, may redeem any real estate sold under execution of judgment or foreclosure of mortgage, at any time within one year from the date of the sale, by paying the amount of purchase-money, with interest at the rate of one per centum per month thereon from the date of sale, together with the amount of any taxes the purchaser may have paid.

"SEC. 2. This act to take effect and be in force from and after its approval."

It is respectfully insisted there should be a reversal in this case.

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IN THE

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DECEMBER TERM, 1888.

HOLLON PARKER, *Appellant*,

vs.

GEORGE DACRES, H. P. ISAACS, ALFRED THOMAS, J. C. SMITH, WM. KIRKMAN, JOHN LUCAS, AND JAMES McAULIFF, *Appellees.*

No. 157.

Appeal from the Supreme Court of Washington Territory.

Brief of Appellees.

W. W. UPTON,
B. L. & J. L. SHARPSTEIN,
Solicitors for Appellees.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

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STATEMENT.

The amended complaint herein alleges that plaintiff, on the 28th day of December, 1874, was the owner of the premises described therein; that said premises at the time were subject to a decree recovered by one Joseph Petraine against Edward Shiel and others in the District Court of the first judicial district of Washington Territory, holding term at Walla Walla City for the counties of Walla Walla and Whitman, and that the sheriff of Walla Walla county, under and by virtue of said decree, sold the premises on the 2d day of January, 1875; that at such sale the defendants became purchasers of separate parcels of said premises; that plaintiff, on November 10th, 1875, within

six months after the confirmation of said sale, applied to the then sheriff of Walla Walla county to redeem said lands from said sale; that redemption was refused him, and that deeds were executed to the several purchasers and recorded. To the said amended complaint the defendants demurred, upon the grounds, first, that the amended complaint does not state facts sufficient to constitute a cause of action; second, that several causes of action have been improperly united; which demurrer was sustained.

ARGUMENT AND AUTHORITIES.

I.

There was no law in Washington Territory prior to February 3d, 1886, (Laws of 1885–'6, page 116,) giving a right to redeem real estate sold under a mortgage foreclosure. We claim that the right of redemption was barred by the foreclosure of the mortgage and sale of the mortgaged premises under the decree of the district court.

2 Jones on Mortgages, section 1047.
3 Pomeroy's Equity Jurisprudence, section 1228.
Stoddart *vs.* Forbes, 13 Iowa, 296.
Kramer *vs.* Rebman, 9 Iowa, 114.
Gargan *vs.* Grimes, 47 Iowa, 180.
William F. Weld *vs.* James H. Rees, 48 Illinois, 428.
Weiner *vs.* Mitchell, 17 Illinois, 259.
Ballinger *vs.* Bourand, 87 Illinois, 513.
Weiss *vs.* Alling, 34 Connecticut 60.
Frink *vs.* Murphy, 21 California, 108.

II.

The act of the Legislature of Washington Territory known as the Civil Practice Act, or Code of 1873, contains express provisions upon the subject of redemption from

sales made under executions issued upon ordinary judgments for the recovery of money, but it carefully guards against the application of those provisions to sales made upon foreclosure of mortgages. The act explicitly points out the manner of entering and of enforcing judgments in ordinary cases, defining with great particularity four classes of executions to be issued upon such judgments, and in a subsequent chapter under the title "Foreclosure of Mortgage," it makes separate and distinct provision as to the method of foreclosure, requiring the mortgaged premises to be first sold and to be sold in pursuance of the express order of the Court, and by virtue of a copy of the order, as distinct from an execution; and in place of permitting redemption to be made in case of sales upon foreclosure, the statute carefully provides that the sale in such case shall foreclose the equity of redemption.

The provisions for enforcing judgments in cases other than foreclosure are as follows (code of 1873, page 84):

"SEC. 321. There shall be four kinds of execution: One against the property of the judgment debtor, another against the person, a third for the delivery of the possession of real or personal property or such delivery with damage for withholding the same, and the fourth commanding the enforcement of or obedience to any special order of the court. And in all cases there shall be an order to collect the costs.

"SEC. 322. The writ of execution shall be issued in the name of the United States, sealed with the seal of the court and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner, when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the district or county where judgment was rendered; the names of parties; the amount of judgment, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:

"1st. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of the personal property of the debtor,

and if sufficient personal property cannot be found, out of his real property, upon which the judgment is a lien."

* * * * * * *

"SEC. 364. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases such property shall be subject to redemption as hereinafter provided in this chapter. At the time of the sale the sheriff shall give to the purchaser a certificate of the sale, containing—

"1. A particular description of the property sold.

"2. The price bid for each distinct lot or parcel.

"3. The whole price paid.

"4. When subject to redemption it shall be so stated.

"The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ.

"SEC. 365. Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest:

"1. The judgment debtor or his successor in interest in the whole or in part of the property separately sold.

"2. A creditor having a lien by judgment, decree, or mortgage on any portion of the property or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold.

The persons mentioned in subdivision two of this section are termed redemptioners.

"Sec. 366. The judgment debtor or redemptioner may redeem the property within six months from the date of the order confirming the sale by paying the amount of the purchase-money, with interest at the rate of two per cent. per month thereon from the time of sale, together with any taxes which the purchaser may have paid thereon, and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien, with interest.

"Sec. 368. If no redemption be made within six months from the confirmation of the sale the purchaser shall be entitled to a conveyance from the sheriff. * * *

"Sec. 369. The mode of redeeming shall be as provided in this section:

"1. The person seeking to redeem shall give the purchaser or redemptioner, as the case may be, two days' notice of his intention to apply to the sheriff for that purpose at the time specified in such notice; such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate as in case of a sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. A party seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:

"2. Proof that the notice required by this section has been given to the purchaser or redemptioner, or waived.

"3. If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem certified to the clerk of the court where such judgment or decree is docketed, or if he seeks to redeem upon mortgage the certificate of the record thereof.

"4. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent showing the amount then actually due on the judgment decree or mortgage.

"5. If the redemptioner or purchaser have a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded.

"Sec. 370. When two or more persons apply to the sheriff to redeem, at the same time, he shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed if he attend at the redemption, or, if not, at any time thereafter, when demanded. Where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby, and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required by order of the court or judge thereof to allow such redemption."

"Sec. 371. Until the expiration of the time allowed for redemption, the court or judge thereof may restrain the commission of waste on the property by order granted with or without notice. * * *

The special provisions of the Code of 1873, under which the sale was made in this case, are found in Chapter 50, under title of "Foreclosure of Mortgage," and among them are the following:

"Sec. 563. In rendering judgment of foreclosure the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt with interest and costs at any time *before sale* shall satisfy the judgment.

"Sec. 564. When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied upon any property of the mortgage debtor.

"Sec. 565. A copy of the order of sale and judgment shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises or so much thereof as may be necessary to satisfy the judgment, interest, debt and costs as upon execution; and if any part of the judgment, interest, and costs remain unsatisfied the sheriff shall forthwith proceed to levy the residue on the property of the defendant. The sheriff shall endorse upon the order of sale the time when he received it, and all subsequent proceedings under the said order shall conform, except as hereinafter provided, to the provisions regulating the sales of property upon execution.

"Sec. 571. In all actions of foreclosure when there is a decree for the sale of the mortgaged premises or property, and a judgment over, any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same order of sale. * * * Nothing herein shall prevent the issue of an execution, as in ordinary cases, either for the whole mortgage debt or such deficiency, after applying the proceeds of sale of mortgaged property. When, however, an execution shall issue upon a judgment recovered for a debt secured by mortgage, a schedule of the mortgaged

property, real or personal, shall be indorsed upon such an execution, and the sale thereof under such order shall foreclose the equity of redemption or the mortgage therein.

"SEC. 573. Judgments over from any deficiency, remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor as other judgments, and the collections thereof enforced in the same manner."

Prior to the act of 1873 sales upon foreclosure were not subject to redemption, and such continued to be the practice in the Territory up to the change made by the act of February 3d, 1886; and appellee's claim that there is nothing in the act of 1873 which, under recognized rules of construction, can be deemed intended to change the law in that respect. The subject of redeeming is mentioned in connection with the enforcement of ordinary money judgments by execution, and the subject-matter of the chapter, of which sections 364 and 365 form a part, is such that this of itself leads irresistably to the conclusion that the cases referred to in those sections are cases of sale upon execution and no others.

Kramer *vs.* Rebman, *supra.*

Stodart *vs.* Forbes, *supra.*

Weimer *vs.* ~~Miller, supra.~~ Heintz, 17 Ill. 259

Foreclosure is the act of depriving a mortgagor of the right of redemption. (See case last above-cited.)

2 Jones on Mortgages, sec. 1074.

If it were less obvious that sections 364, 365 and 366, in regard to redemption, have reference solely to cases embraced in the chapter relating to executions, it is rendered certain by the express provision of section 571.

Kramer *vs.* Rebman, supra.

3 Pomery on Equity, sec. 1228.

Rohrer on Judicial Sales, sec. 1148.

The distinction between sales upon execution and sales in pursuance of decretal orders theretofore existing, is recognized and re-enacted in the act of 1873 by declaratory provisions under the title, foreclosure of mortgage, that continue the then existing practice of discribing the property in the decretal order (sec. 563) of selling by virtue of a copy of the order in place of an execution (sec. 365) of requiring the mortgaged property to be first sold, while section 322 requires an execution to be first levied upon the personal property; and by providing (sec. 565) that in foreclosure cases payment may be made at any time *before sale*, while section 366 gives the execution debtor six months *after* the date of confirmation; and to put it beyond question that a sale upon foreclosure is final and not subject to redemption, it is expressly enacted in section 571 that the sale thereof under such order shall foreclose the equity of redemption.

The rule of construction that a special provision on a given subject controls the meaning of a more general provision in the same statute on the same subject is applicable to all that is said in the act under the title "foreclosure of mortgages," and particularly to the special provisions of section 571.

III.

The right to redeem asserted in the present complaint, if it ever existed, was one of the points involved in the suit brought to foreclose the mortgage, and it is submitted that it was a proper question to be determined in that suit, and that the proceedings in that case are conclusive of the question. It was the duty of the appellant in the protection of his rights to present his evidence and to move the court for the relief he is now asking in a new and independent suit. He could not be prejudiced by the refusal of the sheriff, because the law required the court to super-

vise the sale and to decide all questions as to whether appellant had the right to redeem; the court also had this jurisdiction in ordinary law cases, independently of all that is said in the chapter entitled "Foreclosure of Mortgage."

In section 370 of the code of 1873 providing the method of redemption of property sold on execution in force at the times mentioned in the complaint it is provided that "where a sheriff shall wrongfully refuse to allow any person to redeem, his right thereto shall not be prejudiced thereby; and upon the submission of the evidence and the tender of the money to the sheriff, as herein provided, he may be required, by order of the court or a judge thereof, to allow such redemption," and section 364 requires the sheriff to state in his certificate of sale whether redemption was to be permitted, and to state in his return of the execution to the court what matters were contained in his certificate. Thus the statute brings all matters pertaining to redemption before the court, and the cause is still under the court's supervision and within its jurisdiction. The appellant had a complete and adequate remedy. If on the refusal of the sheriff to allow the appellant to redeem, he had applied to the court and submitted the evidence of the alleged tender and of his right to redeem, the decision of the court would have been a judicial decision within the jurisdiction already acquired; it would have been final and subject to review in this court. By his laches and failure to submit his evidence, the appellant if he had rights has permitted the remedy to lapse.

IV.

The statement that the provisions of the civil practice act of 1873 were "taken bodily from the provisions of the California statute," will not bear examination. The former act contains very many provisions not found in the latter,

and the latter contains many not found in the territorial act. The code of California contains nothing resembling the provision of section 565 of the code of Washington Territory, requiring that, instead of an execution, a certified copy of the decretal order be issued to the sheriff. It contains no declaration that the sale "shall foreclose the equity of redemption," and it lacks many other of the specific enactments relative to foreclosure proceedings contained in chapter 50of the territorial code. It is true, sections 364 and 365 of the latter code are literal transcripts of like sections in the California Code of 1851, but if the question is material, there is both intrinsic and extrinsic evidence, of which the court will take judicial notice, that these two sections were, in fact, copied from the Iowa Code of 1851.

Stevens *vs.* Dennison, 1 Ogn., 22.

These two sections, relative to redemption from sales made under execution, are contained in each of the three codes, but with the marked distinction that the modifying sections 565 and others, above quoted from the code of Washington Territory, prescribing the manner of foreclosure and of sale of mortgaged premises, are substantially ~~transcripts~~ like sections of the Iowa Code. (See Iowa Code of 1851, p. 289.) But the California Code has no similar modifying provisions, and no provision authorizing the sale of mortgaged premises, otherwise than on execution, or provision declaring the effect of a sale upon foreclosure. It contains three short sections on the subject of foreclosure, none of which affect the subject under consideration. (See California Code of 1851, p. 91.)

It is conceded that the rule laid down in Campbell *vs.* Quinton, 4 Ill., 289, and cited by appellant, is correct. In that case Justice Douglass said; "When one State enacts a statute of another State, it is presumed to adopt the construction which the statute has received from a uniform series of judicial expositions." If the conclusion be reached

that the code of Washington Territory is in this respect a substantial re-enactment of the laws of California, *without modification*, and that the act in question had then received such uniform, judicial exposition as contemplated by Judge Douglass, the rule would apply. In Kent and Cahoon *vs.* Laffan, 2 Cal., 595, it was held that the right of redemption applied to sales of property on foreclosure of mortgage. This decision established a precedent, which was followed without question until 1858, when Field, C. J., in case of McMillan *vs.* Richards, 9 Cal., 412, (cited in appellant's brief,) suggests a doubt, in these words: "Whether this decision would be now made were the question an open one, it is unnecessary to determine." Later, in 1872, in case of Gross *vs.* Fowler, 21 Cal., 395, (in appellant's brief,) Field, C. J., said: "This decision has been adhered to since 1852. It is generally conceded by the profession that the decision was based upon an erroneous construction of the statute; but admitting this to be true, it is too late to interfere with it—rights of property of vast value have grown up under this decision, which no court is at liberty at this day to disturb."

We do not understand the rule to apply to a particular section or chapter enacted with new modifications, or to apply to a statute where the courts of its State say their decision is admittedly erroneous.

All that is said by the appellant in favor of following the rule announced by Judge Douglass in the case of Cahoon *vs.* Laffan can be urged in commendation of the course taken by the courts in Washington Territory in following the rulings of the Iowa courts in cons
statute, which is in all respects substantially a
as the Iowa Code, while that rule has no applicabil
decided in California, because the California statutes are radically different in reference to the subjects involved in this suit.

An additional reason for adhering to the rule thus established is, that it has continued the settled practice in Washington Territory during so many years. And a still stronger reason for so adhering is, that in doing so the courts followed the express direction and mandate of the statute under which they were proceeding.

All the reasons stated by Chief Justice Field in McMillan *vs.* Richards and Gross *vs.* Fowler are applicable to the change of construction proposed by the appellant. Property has been acquired and rights have become vested under a rule that has long been approved by the courts and acted upon by the community. Even this appellant has quietly acquiesced in this rule for many years, and even now after increased values of property, one of the principal arguments in favor of his position is based on the idea that the Territorial Legislature, by enacting in 1881 that in foreclosure cases the sheriff should execute and deliver the deed within five days after the confirmation, [redacted] indicated legislative doubt as to whether or not the act of 1873 permitted redemption after sale on foreclosure. It is submitted that such inference does not necessarily arise. There are many other reasons for specifying a definite time beyond which the sheriff should not delay the delivery of the deed, and if such doubt did exist in the minds of the legislators it would in no way change the law then in force.

Section 379 of the code of 1881 referred to in the opinion of the court below is as follows:

"In all cases where real estate has been or may hereafter be sold in pursuance of law, by virtue of an execution or other process, it shall be the duty of the sheriff or other officer making such sale to execute and deliver to the purchaser or other person entitled to the same a deed of conveyance of the real estate so sold, as follows:

"1. When such execution or process issues upon an ordinary money judgment said sheriff or other officer shall execute and deliver such deed within six months after the confirmation of such sale.

"2. When such execution or other process issues upon a decree for the foreclosure of a mortgage such sheriff or other officer shall execute and deliver such deed within five days after the confirmation of such sale." * * *

V.

The case of Clark *vs.* Rayburn, 8 Wall., 318, does not discuss the question whether a public sale of mortgaged premises, after due notice, has the effect of foreclosing the equity of redemption. The points decided were that a purchaser of the mortgaged premises not made a party was not bound by the prior foreclosure, and that a strict foreclosure, cutting off the equity of redemption without sale of the premises, cannot be effected by a decree which does not find the amount due, and which allows no time for payment or redemption.

It does not intimate that the equity of redemption would not have been lawfully foreclosed by a public sale of the mortgaged premises. It does not touch the question whether a legislative enactment providing a mode of foreclosure, is effective, nor intimate that a statutory provision, to the effect that a sale of mortgaged premises in pursuance of a decretal order and after the notice prescribed by statute, "shall foreclose the equity of redemption," is improper or inoperative.

In the case before the court the decree found the amount due, and the law which prescribed the time of notice of sale, allowed a time after the decree and before the sale, for payment and redemption.

The statement that the "defendants notified the plaintiff that they would not permit him to redeem said property" is not a material allegation. The tender was to be made to the sheriff, and not to the defendants. It is a matter that the defendants could not control, and their objection did not relieve the plaintiff from complying with the law. The whole matter was under the control of the court; and

to enable the plaintiff to apply even to that court for an order upon the sheriff, had the sheriff and all other parties refused to permit him to redeem, it was necessary for him to comply with the statute and to present to that court the evidence that he had so complied. In making his present application for relief it is necessary that his complaint should state facts, and not conclusions, showing that he did the acts prescribed by statute in making his application to the sheriff.

Appellant's counsel presents a question whether the record, including his complaint, shows that the decree was rendered in a suit to foreclose a mortgage; and although he generously proposes to waive this point, it seems appropriate to say, if the record is defective in this particular the defect is in appellant's pleading. He was the moving party in the court below, and is now the moving party, seeking to reverse the decision of that court. In order to have any benefit on the ground that the sale was not upon foreclosure, if it was not, that is one of the material facts that should be made certain by the allegations of his complaint, and which should appear on the face of the record he brings to this court. If the record is faulty in this respect, the defect is one of which the appellees complain when they say the complainant does not state facts sufficient to constitute a cause of action.

But there is a still more prominent defect in the complaint, which is closely allied to the one mentioned by appellant's counsel. It does not appear in the complaint, or elsewhere in the record that the appellant was a judgment debtor, or a successor in interest, or a creditor. He alleges that he was the owner of the mortgaged premises, and that they were conveyed to him by Edward Shiel, who was one of the five defendants in the foreclosure suit. (Transcript, pages 6 and 7.) But he does not show that Shiel ever had any interest in the premises. He does not

show which of the five defendants executed the mortgage, nor whether Shiel was sued as maker or as indorser or surety, or whether he was made defendant to bar some alleged equity or to remove a cloud. To be a redemptioner as successor in interest he must show that he is successor in interest in the mortgaged property or in a "part of the property separately sold," and the complaint should show that he exhibited to the sheriff the evidence necessary to establish his claim. The complaint fails to state facts sufficient to show that the appellant acquired any interest in the property by means of the conveyance, a copy of which is exhibited to the sheriff.

Error will not be presumed, and the judgment of a court will not be reversed unless the record show affirmatively that there is no just ground upon which the judgment could lawfully have been rendered.

VI.

If a right to redemption of mortgaged premises after a sale under a decree of foreclosure exists in Washington Territory, it must be statutory and the statute must be strictly complied with.

Herman on Executions, sections 263–265.
Haskell *et ux. vs.* Manlove, 14 California Reports, 54.
Gilchrist *vs.* Comfort, 34 New York, 235.
Freeman on Executions, section 314.
People *vs.* Browne, 19 Wendell, 87.

Plaintiff should in his complaint show a compliance with the provisions of the statute.

Appellant fails to show the amount due at the time of the attempted redemption, and also the amount tendered.

The statement that "the plaintiff tendered to George F. Thomas [sheriff] in United States legal-tender money the amount necessary to redeem the said property" is not a statement of the facts, but of a conclusion; a conclusion to be drawn by the court from facts that should be stated.

The appellant also fails to show the date of the confirmation of the sale, a material fact. His statement that his attempt to redeem was made "before the expiration of six months from the confirmation of said sale," is also the statement of a conclusion. There is no sufficient averment of a tender in the complaint.

Englander *vs.* Rogers, 41 California, 420.
Murray *vs.* Windley, 47 American Decisions, 324.
Hayden *vs.* Anderson, 17 Iowa, 158.

The complaint should state facts from which the court can determine whether the amount of the alleged tender was the amount required to redeem. The plaintiff should state every fact which he will be required to prove.

He should state facts as distinct from conclusions.

Green *vs.* Palmer, 15 California, page 412.

One who seeks to set aside a settled practice and to reverse a decision upon technical ground, should himself be technically correct.

VII.

The complaint shows upon its face that the plaintiff's alleged cause of action, if any he had, was barred by the statute of limitations before the commencement of this action. The complaint alleges that the property was sold by the sheriff, under and by virtue of the decree of the district court, on the 2d day of January, 1875. The summons in this action was issued on the 9th day of April, 1885.

The statute of Washington Territory in force at the time of the commencement of this action is found in the laws of 1883, page 44, as follows:

"Sec. 59. Civil actions in the several district courts in this Territory shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought and the issuing of a summons thereon, together with a copy of the complaint, duly certified by the clerk, under the seal of the court." * * *

We contend that plaintiff's cause of action, if any he had, is within the provisions of section 32, Code of 1883, of Washington Territory, page 10, which is as follows:

"Sec. 32. An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Plaintiff contended in the court below that the action came within the first subdivision of section 26 of the Code of 1881 of Washington Territory, which is as follows:

"Sec. 26. The period prescribed in the preceding section for the commencement of actions shall be as follows:

"Within ten years:

"1. Actions for the recovery of real property or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action." * * *

The following cases are in point:

Alfred S. Hubbell *vs.* Hiram Sibley, 50 New York Reports, 468.

Russell D. Miner *vs.* Annie M. Beekman *et al.*, 50 New York Reports, 337.

The sections of the New York code of like import as ours will be found in Voorhees' Code, (8th ed.,) sections 78, 79, and 97.

No question was made in the district or territorial supreme court as to our right to take advantage of the statute of limitations by demurrer, and our supreme court has held that where it appears from the face of the complaint that the statute has run advantage may be so taken.

J. H. Wilt *vs.* Joseph Buchtel, 2 Washington Territory Reports, 417.

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